APPELLATE CRIMINAL.

Before Cunliffe and Henderson JJ.

1937

Feb. 9.

DEBEE CHARAN HALDAR.

v.

EMPEROR.*

Culpable homicide—Indian Penal Code (Act XLV of 1860), ss. 304, 34.

A verdict of guilty under s. 304(*1*) read with s. 34 may not be theoretically impossible, but it is almost impossible to visualise the practical mentality that can conceive a common intention to commit culpable homicide not amounting to murder by exceeding the right of private defence. It is difficult to suppose that two or more persons, who have the right of private defence, would in real life have a sort of discussion to reach such a common intention exceeding that right.

In a clear case of murder or nothing, to direct the jury that they might alternatively return a verdict of guilty under s. 304(*1*) read with s. 34 is to give the jury an opportunity to bring in a loophole verdict thereby avoiding the necessity of returning a verdict entailing capital punishment.

CRIMINAL APPEAL.

The material facts of the case and the arguments in the appeal appear sufficiently from the judgment.

Barwell and *Sudhanshu Shekhar Mukherji* for the accused.

The Deputy Legal Remembrancer, *Khundkar*, and *Beereshwar Chatterji* for the Crown.

CUNLIFFE J. These three appeals proceed from convictions and sentences passed by a Judge and a jury at Faridpur. Three persons tried before them were found guilty under s. 304 (*1*) read with s. 34 of the Indian Penal Code in each case. The appeals were admitted by another Bench of this Court and we have listened to the argument impugning the

*Criminal Appeal, No. 828 of 1936, against the order of Kunja Bihari Ray, Sessions Judge of Faridpur, dated July 12, 1936.

learned Judge's charge both on the facts and on the law. It was a very long charge. There was a great deal of rather, I am bound to say, unintelligible presentation of the law and, as far as the facts were concerned, the learned Judge, whilst dealing with them in his accustomed thorough manner, addressed the jury, in my view, at much too great length. Certain attacks have been made by the learned counsel appearing on behalf of the accused with regard to their accuracy and, on the whole, as far as the facts are concerned, I am of the opinion that the jury ordinarily would not have been misled by the manner in which he handled that part of the case. It is in the application of the law to the facts that, I think, the learned Judge was in error in an important regard and, to understand what I mean, I shall have to refer quite briefly to the case for the prosecution and the case for the defence.

This was a trial where, contrary to most trials in which we get appeals in this Court, the advisers of the accused did call witnesses to testify as to the facts from the defence point of view and, not only that, the leading accused, whose name was Debee Charan Haldar, made a much longer statutory statement in Court than we are accustomed to meet with in ordinary trials; it was not a mere formal statement; it was an attempt to present a substantial version of the facts to the Court.

Now, the prosecution case, as I understand it, was this, that two parties in a village were at variance with regard to fishing in a tank. At the head of one party was the first appellant here Debee Charan Haldar and the leading man in the opposite party was the deceased whose name was Aloke Gain. Aloke Gain with certain followers at his back one day invaded the tank, the whole of which was claimed by the Haldars, and there was a quarrel there with reference to the right of fishing; there was some reference to an earlier case that had taken

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place, a criminal case, and then an attack was made upon Aloke Gain by the two appellants, Nabin Haldar and Pashan, and it is said by the prosecution that this attack which they made upon him with *dâos* was preceded by an instigation from Debee Charan Haldar in somewhat general terms. Afterwards, there was an attempt to keep the body of Aloke Gain in one of the houses of the party which caused the death but finally it was recovered.

The defence case is that the prime-movers in the attack were Aloke Gain's party, that they were claiming the right to fishing, that they threatened the Haldars, that, in fact, they started to pull down a part of the wall of one of the houses, that they announced their intention of taking away the women, and that these, in substance threats, were too much for the Haldar party and the next thing that the defence witnesses knew was that Aloke Gain was lying on the ground, to all intents and purposes, dead. The defence case was that the whole thing was in such a confusion that it was impossible to identify who was really at the bottom of the assault upon Aloke Gain and no one could say who in truth was responsible for his death.

Now, it seems to me that on those two versions of what occurred, if the jury had believed substantially the case put forward by the prosecution, and if they had been clearly and succinctly directed as to their duty, they would have brought in a verdict of murder against the second and the third appellants and abetment of murder possibly against Debee Charan, although it may be noted, when I try to show in my résumé of the prosecution evidence that the alleged exhortation of Debee Charan did not amount in terms to an instigation to murder. He did not say and nobody says that he said "Kill him." What he said was, "Give him some blows," or something like that. But although the learned Judge did put forward the murder direction in his address to the jury

when dealing with the prosecution case, he also did what we deprecate so much in this Court of appeal. He charged them by giving them an alternative in the form of a loophole, what I call a loophole verdict, in which they could, if they choose so to say, find the accused guilty of common intention, that is under s. 34, to commit the crime which did not amount to murder under the provisions of s. 304 (*1*). Let me be quite clear about it. His first charge was that they could bring in a verdict of common intention, and the second, an alternative charge, was that they could, if they choose, bring in a verdict of common intention to commit culpable homicide which did not extend in its criminality, as far as one could see, to murder. The learned Judge did not deal in a very striking way with the defence case, and I do not wonder at that, because on my reading of the evidence of the defence there was an obvious suppression of the whole of the events which those witnesses who went into the box must have seen. I think that the learned Judge in dealing with that part of the charge on the facts probably showed great leniency towards the accused by not commenting on what was to my mind a hiatus in, for example, the long statements of Debee Charan in which he sets out that when the tumult commenced he got so bothered that he sat down on the ground and could see nothing of what had occurred. The learned Judge could have commented, if he liked, very severely on that part of the case which left a gap and the jury might have been inclined, I think, to accept a direction of that character. The natural inference, if they did accept it, was that they were not telling the whole truth. The defence witnesses were endeavouring to conceal something. We do not find that the learned Judge did that. He, rather sketchily, if that is a judicial expression, referred to the defence evidence and then made this charge to the jury in law with regard to their alternative jury right of bringing in a verdict under s. 304 (*1*). Section 304 (*1*) is in

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reality an artificial section in the Penal Code. If a Judge directs a jury that they can on certain facts bring in a verdict of a common intention to commit culpable homicide not amounting to murder, he has, in fact said to them, "You can on "the evidence in this case consider that there was a "common intention to commit culpable homicide "which does not amount to murder, because the per- "sons who committed the crime are protected by one "of the four exceptions in s. 300," and a more confusing way of putting a case before a jury I cannot imagine. Quite apart from the fact that it is almost impossible to visualise the practical mentality that can conceive such a common intention, I can understand a common intention to kill some one to defend oneself at all costs, I can understand a common intention to cause hurt to some one in a general sense. But I find it very difficult to comprehend a common intention among three possibly quite uneducated villagers to commit culpable homicide not amounting to murder in the language of the Indian Penal Code and man-slaughter in the English Common Law. However, that is what the jury did. They brought in a verdict on those lines taking advantage of the avenue of escape allowed to them by the learned Judge which, of course, does not necessitate the passing of a death penalty or even the consideration of the passing of a death penalty.

In my opinion, the proper way to direct this jury was to tell them that if they accepted the defence evidence they ought to have acquitted the three appellants on the basis that the accused are always to be given the benefit of a substantial doubt. If they had believed the prosecution evidence in its entirety, they ought to have been directed to bring in a verdict of murder and nothing else. On the other hand, if they had chosen, as perhaps they did, it is impossible to say what they really thought, as it appears they rejected some part of the prosecution story although they could not get away from the fact of the dead

body being picked up after the mêlée, then I think they ought to have been instructed to find Nabin and Pashan guilty possibly of culpable homicide under s. 304 (*1*) with the exceptions thoroughly explained and that, if necessary, a satisfactory reply to a question put by the Judge as to a consideration of the exceptions and then they ought to have been ordered to appreciate judicially the position of Debee Charan as a possible instigator of the crime. The learned Judge did not do that. He adopted the stereotyped and artificial course which I endeavoured to describe.

So we are in this position. We do not know what the jury thought. We do not know whether they were inclined to be guided on the facts by the defence evidence or what part of the prosecution evidence they relied on although it was certain that they did not rely on all the evidence. In these circumstances, the case has raised such a doubt in my mind—and that doubt is based upon the misdirection of the learned Judge,—that I think it would be unsafe to uphold these convictions. Accordingly these appeals will be allowed and the convictions and sentences set aside. We direct that the appellants be forthwith set at liberty.

HENDERSON J. The verdict in this case is a startling one. I am not going to say that it is theoretically impossible; but whenever I see it, I shall want to satisfy myself that the jury were instructed in such a way that they really understood what they were doing. On the prosecution case, the appellants were charged with murder. The learned Judge put before the jury certain exceptions. The only possible explanation of the verdict is that the jury thought that the case came within one or other of the exceptions. The learned Judge remarked that the verdict was not perverse and that it is supported by the weight of evidence on the record. I am bound to say I do not quite follow this when we

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are left completely in the dark as to the real basis of this opinion.

Now, the prosecution case is extremely simple and there can be no question that, if it is true, the appellants ought to be convicted of murder. It is, however, apparent from the verdict that the jury disbelieved it, and I am bound to say that I am not at all surprised. Even on the prosecution evidence itself it seems quite clear that the real cause of the quarrel between the parties was the dispute about the right to fish in the tank. I do not suppose that any jury would accept the prosecution story that Debee Charan ordered a murderous attack to be committed on the deceased merely because he wanted some men, who were engaged in baling out water in the tank, to bale out the water of his own ditch later on: because such an act would do no injury to Debee Charan at all. The prosecution version entirely fails to explain why this regrettable incident should have taken place in fact.

The defence examined some witnesses; but if we take the whole of the evidence together, it can safely be said that there is nothing to support exception No. 1 or exception No. 4. In my opinion, the learned Judge would have been well advised to say nothing about them. There certainly, however, was evidence from which the defence could invoke the application of exception No. 2. Here, again, I have no doubt that the jury refused to believe that the defence were telling the whole truth. They also probably thought that the defence version was exaggerated. But anyhow they must have been satisfied to this extent at least that the complainant's party was attempting forcibly to take fish out of the tank and that the appellant's party had the right of private defence to some extent.

This being the position with regard to the evidence it became very necessary for the learned Judge to give a clear explanation of what would be the

effect of this on the prosecution case. Although the charge is lengthy and full of repetition, he entirely omitted to give any such explanation. The verdict of the jury implies not merely that there was a common intention to use force, because on the defence case the appellants' party were entitled to use some amount of force, but also that there was a common intention to exceed the right of private defence. That to my mind, is absolutely unreal and in nearly every practical case must be ridiculous. The common intention of persons who are defending themselves would be ordinarily either to protect their person or their property. If the attacking party decided that discretion was the better part of valour, no force would be used at all and no injury would be caused to anybody. I do not suppose that two or three persons who have the right of private defence would ever in real life have a sort of discussion to reach the common intention of exceeding that right. As the learned Judge did not explain the implication of this to the jury at all, it is possible that they had not the remotest idea of what they were doing and, therefore, they brought in this startling verdict. It is not enough merely to explain the application of s. 34. The learned Judge should then have gone on to deal with the evidence to point out what, if any, there was to support such a theory. Had he done that, I have no doubt at all that the jury would have reached the conclusion that the theory was merely fantastic.

I will illustrate this by taking the case of Debee Charan. It is not even suggested that he had anything to do with the killing. He is supposed to have given a *hukum*. Now, the learned Judge should have pointed out to the jury that this particular *hukum*, which appears in the prosecution evidence, is absolutely bound up with the prosecution story. There is certainly no room for it if the defence version is true. He should then have pointed out that whereas it was very necessary to have a *hukum* of

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some sort in the prosecution version in order to explain why the other two appellants should attack Aloke Gain for no reason whatever, there was, however, no need for a *hukum* if the defence version was true. People would defend themselves without waiting for any such *hukum* to do so. There is also the well known habit of people implicating the principal man of the opposite side by saying that he gave an entirely unnecessary *hukum*. Finally, as my learned brother pointed out, there is nothing to show that the *hukum* which is said to have been given shows any common intention to cause death. I cannot imagine that any jury would have convicted the appellants of any offence punishable under s. 304, Part I, read with s. 34, if there had been any attempt to put the case before them in a clear and proper way.

As the real implication of s. 34 was not explained to the jury and as the evidence alleged to throw some light upon the common intention was not put before the jury, these convictions cannot be supported.

I agree with my learned brother that this is not a case in which we ought to direct a retrial. If the prosecution case is true, then undoubtedly the appellants ought to be convicted of murder. On the other hand, if it is not true, I doubt very much whether they ought to be convicted of anything. To suggest that they ought to be convicted of culpable homicide is to suggest that the realities of the case should be entirely ignored and purely imaginery circumstances substituted for them. I do not suppose that any reasonable jury being dissatisfied with the truth of the prosecution story would do anything else than bring in a verdict of not guilty. I, therefore, agree that the convictions and sentences should be set aside and the appellants set at liberty.

Appeal allowed. Conviction set aside.

A. C. R. C.