APPELLATE CRIMINAL.

Before Bartley and Sen JJ

1940

May 3.

EMPEROR

v.

MUJJAFFAR SHAIKH.*

Constructive liability—*Circumstances necessary to give rise to constructive liability for an offence committed by another—Misdirection—Circumstantial evidence, how to be placed before the jury—Indian Penal Code (Act XLV of 1860), ss. 34, 149.*

Section 34 of the Indian Penal Code deals with a set of circumstances quite different from those under s. 149.

It is wrong to tell the jury that if several persons have a common purpose, each person will be liable under s. 34 of the Indian Penal Code for every act done by the others in furtherance of that common purpose. In order to make a person constructively liable for murder under that section it must be proved that he had the intention of committing murder in common with the person or persons who actually committed it and who were his companions in the joint criminal act or enterprise.

Ganesh Sing v. *Ram Raja* (1) explained and distinguished.

A theoretical discourse of what is circumstantial evidence couched in language which must be unintelligible to the jury is quite worthless. The Judge should direct the jury that, if the circumstances are capable of a reasonable interpretation consistent with the innocence of the accused, then he is entitled to be acquitted even if the circumstances raise a strong suspicion against him. In a case depending on circumstantial evidence a direction to the jury to the effect that they should consider whether they are prepared to accept the evidence as showing the guilt of the accused is quite inadequate.

A direction to the jury at the end of the discussion of the evidence against each individual accused person, asking them to consider whether the accused has been falsely implicated may very likely mislead the jury into thinking that, unless they are satisfied that the case is false, they should find the accused guilty. It is, therefore, a misdirection.

CRIMINAL APPEAL.

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

*Death Reference, No. 6 of 1940, and Criminal Appeal, No. 223 of 1940, against the order of M. A. Ispahani, Sessions Judge of Birbhum, dated April 5, 1940.

(1) (1869) 3 B. L. R. (P. C.) 44.

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J. P. Mitter and *Bireswar Chatterjee* for the appellant.

Satindra Nath Mukherjee for the Crown.

SEN J. Panchkarhi Shaikh and his two sons, Mujjaffar Shaikh and Saifer Shaikh, were tried for the murder of one Abdul Rashid by the Sessions Judge of Birbhum and a special jury. By a unanimous verdict, the jury found Panchkarhi not guilty and, by a majority of 5 to 4, they found Mujjaffar Shaikh and Saifer Shaikh guilty of committing murder. The learned Judge accepting the verdict of the jury, acquitted Panchkarhi and sentenced Mujjaffar and Saifer to death; he has referred the case to us for confirmation of the sentence.

Mujjaffar and Saifer have appealed.

The case for the prosecution, briefly, is as follows :—

Panchkarhi and his two sons Mujjaffar and Saifer were on bad terms with the deceased Abdul Rashid, who is the son of Panchkarhi's sister. About six months before the murder, the three accused were sent up on a charge of theft and Abdul Rashid helped the police against them. This led to further ill-feeling between the parties. On November 2, 1939, Rashid lodged an information at the *thânâ* complaining that the three accused persons and one Nabuat had been threatening him with bodily harm. On January 16, 1940, in the morning there was a *sâlis* regarding a dispute between Panchkarhi and his brother Ekrar, over a wall. At this *sâlis* Rashid and his brother attended and there Panchkarhi said that both the brothers should not be allowed to take part in the *sâlis* and threatened them saying that they should be "removed from this world".

On the same day, Rashid left the Co-operative Bank at Rampurhat, where he works, at about

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5-15 p.m., with one Mir Najim Ali. They were returning home after their work. They first went to a cloth shop where Rashid purchased some cloth and thereafter departed—Rashid going homeward to his village of Binodepur on a bicycle. He was seen by some persons riding towards the village. Now, to go to his village from Rampurhat, one must pass a culvert called Hiranbandi culvert. Rashid was last seen at about 5-40 p.m. by one Roshan Ali (P. W. 10) riding on his bicycle about a mile from the culvert. On that day, at about 6 p.m., certain persons saw a bicycle lying on the embankment near the culvert about 80 cubits away. They also saw the appellants and another man who looked like Panchkarhi near about this place. Nothing further was seen of Rashid or of his bicycle on that day. On the next morning, at about 7 a.m., certain persons walking along the road saw a corpse in a ditch near the culvert and this corpse was that of Rashid. Nearby there was a bicycle and near the bicycle was the blade of a clasp knife. Later on, in the ditch the brass handle of this knife was found. The police were informed, they came on the scene and took charge of the corpse and after investigation sent up the appellants and Panchkarhi for trial on a charge of murder.

The medical evidence shows that death was due to a punctured wound $3\frac{1}{2}'' \times 1''$ on the neck. The wound penetrated deep down to the thyroid cartilage and the carotoid artery was cut. There were other injuries on the face, forearm and finger.

The case against the appellants rests entirely upon circumstantial evidence. I propose to set forth the main incriminating facts upon which the prosecution depends. They may be stated thus:—

(a) There was ill-feeling between the parties and on January 16, 1940, there was a threat by Panchkarhi that the deceased should be "removed

"from this world". This threat is spoken to by the brother of the deceased Abdul Hamid (P. W. 13). Abdul Kader (P. W. 18) also speaks to the fact that Panchkarhi or Saifer spoke in a threatening manner, but his evidence does not corroborate that of Abdul Hamid regarding the actual words used.

(b) The presence of Mujjaffar and Saifer and a person who looked like Panchkarhi near about the culvert on January 16, 1940, at about 6-15 p.m. This fact is spoken to by Kumarish Let (P. W. 2), Gopal Banerji (P. W. 20), Upendra Muchi (P. W. 25), Mokram Hossain (P. W. 26) and Kasim Shaikh (P. W. 27). The evidence is that Mujjaffar was loitering about near the culvert and the other two persons seemed to be pressing something down in the ditch. One of the witnesses also says that he saw Saifer running away. This is Mokram Hossain (P. W. 26).

(c) On that day, Mujjaffar was late in attending the dispensary where he worked and when he got there he opened an almirah and took out some iodine without the permission of the person in charge. He applied the iodine to some injuries on his person without showing them to anybody there. The medical evidence shows that there were two slight injuries on Mujjaffar, one was a scratch on the right cheek and the other, an abrasion on his right hand.

(d) The conduct of Mujjaffar on the day following the murder; on January 17, 1940, certain persons saw the corpse of Rashid in the ditch. Mujjaffar was accompanying some of these persons. They saw the handle of a knife lying near the bicycle. Mujjaffar picked up this handle and threw it into the ditch. When the witnesses asked Mujjaffar why he was doing this, Mujjaffar merely said "it does not matter."

(e) When Abdul Hamid, the brother of the deceased, after hearing that his brother's corpse had

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been found, was going towards the culvert, Mujjaffar came up to him and tried to dissuade him from going there saying "I passed by the place. It "is all false to say that there has been a murder."

(f) The knife found at the place is said to belong to Saifer. This is spoken to by two witnesses, namely, Ali Akbar (P. W. 17) and Osman (P. W. 32).

(g) Saifer was seen on the morning after the murder wearing a *dhoti* with blood-stains in front. This was seen by two persons, namely, Kalu (P. W. 23) and Abdul Sattar (P. W. 24). They say that when Saifer's attention was drawn to this blood-stain, he hurriedly went to his house, changed the *dhoti* and reappeared in a *sârhi*. These are the main facts upon which the prosecution depends.

The defence of the accused is that Rashid was carrying on an intrigue with the daughter of a Muchi and that someone had killed him in that connection. It was suggested that the witnesses were implicating them because of previous enmity.

I shall now deal with the Judge's charge to the jury. In my opinion the charge is unsatisfactory in several respects. The learned Judge has not given adequate directions to the jury as to how they should deal with a case in which the guilt of the accused is sought to be established by circumstantial evidence. This is what the learned Judge says :—

> Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, but by the bearing upon that fact of other facts which are relied upon as inconsistent with any result other than truth of the principal fact.

A theoretical discourse like this of what is circumstantial evidence couched in language which must have been unintelligible to a moffussil jury is, in my opinion, quite worthless. The learned Judge should have told the jury that, if the

circumstances were capable of a reasonable interpretation consistent with the innocence of the accused, then the accused were entitled to be acquitted even if the circumstances raised a strong suspicion against them. He should have summarised the circumstances alleged against the accused and asked the jury to decide whether from these circumstances the only reasonable inference to be drawn was the guilt of the accused and should have told them that if that was not the only reasonable inference, they should acquit the accused. Nothing of this kind was done. After giving this definition of circumstantial evidence and after telling the jury that they had to arrive at a decision on circumstantial evidence, the learned Judge concludes thus:—

> You should therefore consider whether you are prepared to accept the same as showing the guilt of the accused persons.

These directions in a case depending on circumstantial evidence are, in my opinion, quite inadequate.

The next defect in the charge is this: The learned Judge summarises the evidence against each of the accused persons and at the end of each summary he makes the following observation:—

> This is the evidence against the accused. Do you think that he has been falsely implicated?

He uses these very words three times at the end of each summary. This is a wrong method of approach in a criminal case. The issue before the jury was not whether the accused were being falsely implicated but whether the prosecution had proved beyond reasonable doubt that the accused were guilty. A question like this repeated at intervals at the end of the summary of the evidence against each of the accused is very likely to misguide the jury into thinking that, unless they were satisfied that the case was false, they should find the accused guilty. The wholesome principle that where the jury is in doubt as to whether the

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case is false or true, they should give the accused the benefit of that doubt, seems to have been lost sight of by the learned Judge when he put this wrong issue before the jury.

Again the learned Judge was wrong in his treatment of the application of s. 34 of the Indian Penal Code to this case. This is what he says :—

> I shall explain to you what s. 34 of the Indian Penal Code means. Under this section where parties go with a common purpose to execute a common object, each and every one becomes responsible for the acts of each and every other in execution and furtherance of their common purpose. As the purpose is common so must be the responsibility.

Now this is not a proper explanation of the provisions of s. 34 of the Indian Penal Code. This passage in the learned Judge's charge is a verbatim reproduction of a passage to be found in the notes under s. 34 of the Indian Penal Code in Ratanlal's Law of Crimes, 11th Ed., p. 61. The author in making this comment refers to the case of *Ganesh Sing* v. *Ram Raja* (1). I have consulted the case and I find that the learned author has quoted a passage from the judgment of their Lordships of the Privy Council at pp. 45 and 46. Now this case has nothing whatsoever to do with s. 34 of the Indian Penal Code. It was not a criminal case at all. Their Lordships were dealing with a suit for damages instituted against several persons who were alleged to have plundered the property of the plaintiff at the time of the mutiny. They said that each of the plunderers was liable to pay damages and that damages should not be apportioned, inasmuch as each of the plunderers had the common purpose of plunder. Their Lordships went on to say that the position would be different if it were a criminal case. It is sometimes dangerous to accept as accurate notes appearing in text books. It is always safer to refer to the decision itself on which the note is based. The note relied upon

(1) (1869) 3 B. L. R. (P. C.) 44, 45.

by the learned Judge and incorporated by him in his charge is entitely misleading and inaccurate and I have no doubt that the jury were misled by this direction of the learned Judge. In my opinion, it is quite wrong to say that, if several persons have a common purpose, each person will be liable for every act done by the other in furtherance of that common purpose. For instance, three persons may have the common purpose of robbing a bank; one of these persons, unknown to the others, arms himself with a pistol and shoots one of the bank's assistants who resisted him. The others will certainly not be liable for murder unless it is proved that all of them had the common intention that any one who resisted them would be shot. In the present case s. 34 of the Indian Penal Code would not apply, unless it could be established that Mujjaffar and Saifer had the common intention of murdering Rashid. The learned Judge should have made this clear to the jury. In fact he should have told the jury that, unless it could be proved beyond all reasonable doubt that Mujjaffar and Saifer both had the common intention of killing Rashid, neither could be found guilty of murder, as there is no evidence to show who actually struck the deceased. This is the fundamental weakness in the case for the prosecution and the learned Judge seems to have overlooked it.

In order to make a person constructively liable with the aid of s. 34 of the Indian Penal Code for an offence not actually committed by him, it must always be shown that the persons so sought to be made liable had the intention requisite for the constitution of that particular offence. Thus to make him constructively liable under s. 34 of the Indian Penal Code for murder it must be proved that he had the intention of committing murder in common with the person or persons who actually committed the murder and who were his companions

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in the joint criminal act or enterprise. Unless this intention is proved he cannot be made liable under the aforesaid section even though the murder be committed in order to accomplish some other object or purpose shared in common. Under s. 149 of the Indian Penal Code the position would be different. That section runs thus:—

> If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person, who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Section 34 of the Indian Penal Code deals with quite another set of circumstances. That section runs thus:—

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

The provisions of s. 149 of the Code cannot be availed of in this case, inasmuch as the number of the persons involved was less than five. Section 149 cannot come into operation unless there is an unlawful assembly and an unlawful assembly requires the participation of five persons.

Another defect in the learned Judge's charge to the jury is that in placing the evidence before them he does not point out, as he should have done, the inherent improbabilities, inconsistencies and important contradictions in the evidence.

There is no doubt that there was ill-feeling between the accused and the deceased. This is amply proved and indeed it is admitted, but the evidence regarding the threats used by the accused against the deceased on the morning of January 16 is contradictory. As I have said before, the two witnesses who proved this part of the case are —Abdul Hamid, the brother of the deceased, and Abdul Kader, President of the Union Board. Now, Abdul Hamid says that Panchkarhi said that

the brothers should be removed from this world. The President of the Union Board does not say anything of the kind. He says this :—

> Either Panchkarhi or Saifer said,' Why you should not be taken as an arbitrator, both of you will be taken.' It seemed to me that was said in a threatening manner.

Now, this discrepancy in the evidence was not pointed out by the learned Judge to the jury. He merely told the jury that these two witnesses gave evidence to show that there was a threat on the morning of the day on which this incident took place.

The story about Mujjaffar's activities both before and after the murder seems to me to be highly improbable. First, he loitered about on the scene of the murder. It is difficult to understand why he should be loitering about after committing the murder. One would expect that he would commit the murder and disappear as quickly as he could. It is suggested that he was there together with others in order to conceal the body of the deceased. Evidence was given to the effect that Saifer and the man who looked like Panchkarhi were pushing something down in the ditch. Now, the Sub-Inspector, who came the next day and saw the body, says that it did not seem to him that any attempt had been made to conceal the body. The water in the ditch was only eight inches deep. There were no signs of dragging. It seems to me that the story that Mujjaffar, Saifer and a third person were loitering about the place, is not one which can be easily accepted. This aspect of the evidence was not properly placed before the jury by the learned Judge.

Again, the evidence is that Mujjaffar accompanied the witnesses on the next day to the spot, where the body was lying and seeing a knife-handle lying near the body he picked it up and threw it into the ditch in the presence of

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all the witnesses; when asked why he was destroying evidence, he said, "It matters little". A little later when he sees Abdul Hamid, brother of the deceased, crying and going towards the corpse, he tried to prevent him from going there and tells him a palpable and pointless lie that there has been no murder. I find it extremely difficult to believe that any murderer would behave in this foolish fashion and go about creating evidence against himself. This view was not placed before the jury.

Next, we have the evidence that Saifer was seen the day after the murder with blood-marks in front of his *dhoti*. This also seems to me to be improbable. It is not likely that a murderer who had taken precautions to remove all traces of the murder and had the whole night in which to remove the traces of murder would reappear in the morning with blood-stains in front of his *dhoti*. It should be remembered in this connection that there was no *dhoti* with any blood-stain seized by the police from the house of Saifer. All this was not put before the jury.

The story about the knife has also not been properly dealt with by the learned Judge. We have seen the knife and we find that there are no distinguishing marks on it. It is a country-made clasp knife with a brass handle. Witness No. 17, Ali Akbar, says that he borrowed this knife on a single occasion about a month before the occurrence. I find it difficult to believe that this would afford him sufficient opportunity of being able to identify a knife of this description as being the very knife that he had borrowed. The learned Judge does not deal with this aspect of the evidence at all. I would point out in this connection that this witness had the hardihood to identify the blade separately as being the blade of the knife which he had borrowed from Saifer. The other witness on this point is witness No. 32, Osman,

who says that he used this knife of Saifer on five or six occasions. I might incidentally mention that the learned Judge in dealing with this part of the evidence made an error when he told the jury that both these witnesses had used the knife on five or six occasions. The evidence further is that knives like this were hawked about in the village. It is quite possible that other villagers would have knives like this. In my opinion, the evidence regarding the knife is not of any value.

The circumstantial evidence in this case is not such as to leave one no alternative but to hold that the appellants are guilty. Again the circumstances do not establish which person struck the blow. As I have pointed out before, there is great difficulty in the way of the prosecution invoking the aid of s. 34 of the Indian Penal Code in this case, as it has not been established either by direct or circumstantial evidence that both the appellants intended to kill Rashid. Even if one were to take a view unduly favourable to the prosecution in this case, the most that one could say was that one or other of the accused must have killed Rashid. There is no evidence to show that both of them killed him or that both had the intention to kill him. That being so, obviously neither can be found guilty of the murder.

We, therefore, set aside the order of conviction and sentence. In the circumstances of this case, we do not think any useful purpose will be served in ordering a retrial. We, accordingly, acquit the appellants and direct that they be set at liberty forthwith.

The appeal is allowed and the Reference is rejected.

BARTLEY J. I agree.

Appeal allowed. Accused acquitted.

A.C.R.C.