

payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by the institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs. 5 per diem."

I therefore accept the reference to this extent that the order of the Magistrate in inflicting a further fine of Re.1 per diem is set aside, but for the rest the Magistrate's order is maintained and the reference is rejected.

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 APPELLATE CRIMINAL
 

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*Before Mr. Justice Young and Mr. Justice Rachhpal Singh*

EMPEROR *v.* IRSHAD ULLAH KHAN AND OTHERS\*

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 March, 20
 

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*Indian Penal Code, sections 34, 302—Death caused by one out of several persons having a common intention—Common intention to attack a party and prevent irrigation of field—One member, armed with a gun, of the attacking party causing death by shooting—Liability of other members.*

The view that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. Section 34 is applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual. Of course, before section 34 can be applied, the prosecution must prove that the criminal act was done by one of the accused persons in furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code.

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\*Criminal Appeal No. 952 of 1932, from an order of Joti Sarup, Sessions Judge of Bulandshahr, dated the 14th of October, 1932.

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Where a party of men set out towards a field, with the common intention of attacking another party of men and preventing them from irrigating the field from a well, and one of the attacking party had a gun and the others had lathis, and all of them attacked the other party with the result that two persons died of gunshot wounds and others received different injuries, it was *held* that section 34 of the Indian Penal Code applied and all the participants in the attack could be convicted under section 302 of murder.

Messrs. *P. L. Banerji, Kumuda Prasad and Kazi Masud Hasan*, for the appellants.

The Government Advocate (*Mr. Muhammad Ismail*), for the Crown.

YOUNG and RACHHPAL SINGH, JJ. :—Irshad Ullah Khan, Rashid Ullah Khan, Tufail Ahmad Khan, Nisar Khan, Fida and Kaley were tried in the court below under sections 302, 148 read with section 149 and section 307, of the Indian Penal Code. Fida and Kaley have been acquitted. The charge of rioting under section 148 of the Indian Penal Code failed. Irshad Ullah Khan has been found guilty under section 302 of the Indian Penal Code and has been sentenced to death. Rashid Ullah Khan, Tufail Ahmad and Nisar Khan have been held guilty under section 302 read with section 34 of the Indian Penal Code and have been sentenced to transportation for life. All these four accused have also been convicted under section 307 of the Indian Penal Code, and have been sentenced to 7 years' rigorous imprisonment. They have all preferred appeals against their convictions, and the record of the case has been sent up by the learned Sessions Judge for confirmation of the death sentence passed against Irshad Ullah Khan.

Irshad Ullah Khan and Rashid Ullah Khan are brothers. A cousin of theirs is married to Tufail Ahmad Khan. Nisar Khan is said to be a grand-nephew of Tufail Ahmad Khan accused. Ahmad Ullah Khan was the father of Irshad Ullah Khan and Rashid Ullah Khan. He is dead. Musammat Nazir Begam is the step-mother. About 10 bighas of land in village Bagrasi is

held by Musammat Nazir Begam as mortgagee in possession since 1915. This land was in the cultivatory possession of Ram Sarup and his brother Heta as occupancy tenants. It is said that the land remained *parti* for about 2 years. Musammat Nazir Begam leased it to Abdul Majid Khan and his nephew Asad Ullah Khan under a lease executed on the 10th of May, 1932. On the same date Heta and Ram Sarup relinquished this land in the presence of a kanungo.

The evidence produced in the case shows that Irshad Ullah Khan accused obtained an *ex parte* decree in respect of this land against his step-mother. On the date on which the lease was executed in favour of Abdul Majid Khan and Asad Ullah Khan an application was made to the court of the Munsif for setting aside the above-mentioned *ex parte* decree.

It appears from the evidence on the record and from the statement of Musammat Nazir Begam that her relations with Irshad Ullah Khan and his brother Rashid Ullah Khan had been very strained. After the death of her husband these two step-sons used to look after this leased land, but Musammat Nazir Begam did not get any profits and so she leased the land to Abdul Majid Khan and Asad Ullah Khan for a number of years.

The prosecution story is that Abdul Majid Khan had made arrangements to have one of the leased plots irrigated on the 1st of June, 1932. This plot is at a distance of only 80 or 90 yards from his residential house. Some labourers had assembled at the well near the field and irrigation work had started on the morning of 1st of June, 1932. The evidence is that Abdul Majid Khan, Muhammad Said Khan, P. W. 2, and Said Khan were sitting on a chabutra in front of the house of Abdul Majid Khan. They saw all the accused proceeding in the direction of the field which was being irrigated. Irshad Ullah Khan carried a double-barrelled breech-loading shot gun and Rashid Ullah Khan had a spear, while the remaining accused were armed with lathis. A servant

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of Abdul Majid Khan told him that the party of the accused was going towards the well. Upon this Abdul Majid Khan, Said Khan deceased and Said Khan, P. W. 2, followed them. Abdul Majid Khan called the accused and asked them to stop and requested them not to go to the well. It may be remarked here that Abdul Majid Khan was unarmed. All the six accused turned back and Tufail Ahmad Khan asked his companions to beat Abdul Majid Khan and his companions. Upon this Irshad Ullah Khan fired his gun at Abdul Majid Khan. Abdul Majid Khan fell down upon the ground wounded. Then Said Khan deceased rushed towards Irshad Ullah Khan and gave him a lathi blow on the head. Irshad Ullah Khan again fired and Said Khan was hit. He fell down upon the ground and died. Muhammad Said Khan, P. W. 2, says that the other five accused beat him with lathis. He had a lathi and he also hit back. In the meantime Umar Khan and Rab Nawaz Khan came to help Abdul Majid Khan's party. Irshad Ullah Khan rushed towards Rab Nawaz Khan and fired at him. Rab Nawaz Khan fell down wounded. Umar Khan is the father of Said Khan, P. W. 2. He asked the accused persons to cease fighting. But this had no effect and Umar Khan was also beaten by all the accused except Irshad Ullah Khan. Irshad Ullah Khan also fired at Said Khan witness and he was also wounded. One Sarjit, a labourer who had been working at the well, came and caught Irshad Ullah Khan from behind. He was pushed back. Irshad Ullah Khan fired at him and he was also wounded. Jagwa another labourer who happened to be near Sarjit also received gunshot injuries. After this the fight ceased and eventually all the wounded men were taken to Bulandshahr. Abdul Majid Khan died in the hospital on the 6th of June, 1932. One of the arms of Sarjit had to be amputated. Rab Nawaz Khan was undergoing treatment in the hospital in Bulandshahr at the time of the trial.

\* \* \* \* \*

We have given our anxious consideration to the evidence produced on both sides. We feel satisfied that the evidence of the prosecution witnesses is true and has been rightly believed by the learned Sessions Judge. We have the dying declaration of Abdul Majid Khan, which was recorded by a Magistrate on the evening of the 1st of June, 1932. The man was seriously wounded and we cannot believe that he told a story which was not true. According to the evidence produced by the defence, Abdul Majid Khan was held in high esteem by everyone of Bagrasi village, and he was obviously a man of high character. He was an old man of over 60. The evidence proves that he was unarmed. We cannot believe that he ordered his companions to beat Irshad Ullah Khan who was armed with a double-barrelled gun. We bear in mind that on the side of the defence no report was made giving their version of the fight. We do not believe Ram Sarup when he says that he was irrigating one of the leased plots on the 1st of June, 1932. It is the case of both sides that Abdul Majid Khan had gathered some men in the morning of the 1st of June, 1932, at his place. The prosecution case is that these men had already gone and had started irrigation work at the well. The defence is that Ram Sarup and some of his men were irrigating the disputed plot. The story of the defence appears to be improbable. If Abdul Majid Khan had gathered men for irrigation, then it is highly improbable that he could have allowed Ram Sarup to start the work. The well is only at a distance of 80 yards from his house. There could be no reason for him to keep his labourers whom he had collected at his own house. We are of opinion that Irshad Ullah Khan resented the action of Abdul Majid Khan in taking lease of the land from his step-mother. That was the cause of the trouble. In our opinion the prosecution evidence that Irshad Ullah Khan and his companions were going to stop Abdul Majid Khan from

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proceeding with the irrigation work is true. The story of Irshad Ullah Khan that Abdul Majid Khan wrongly suspected that he was backing Ram Sarup does not appear to be true. The evidence clearly proves that on the 10th of May, 1932, both Ram Sarup and his brother Heta relinquished the land. The defence has invented the story that Ram Sarup had determined not to give up possession. The dying declaration of Abdul Majid Khan strongly supports the oral evidence of the eye-witnesses. We, therefore, believe the prosecution story and hold that it is proved that Irshad Ullah Khan was going to the well to stop the irrigation.

So far as Irshad Ullah Khan is concerned, we are of opinion that a clear case of murder has been established against him. We also think that the charge under section 307 of the Indian Penal Code is proved.

Now we turn to the case of the remaining three appellants. We believe that these men were with Irshad Ullah Khan. The evidence of Muhammad Said Khan, P. W. 2, proves that when Abdul Majid Khan followed the party of Irshad Ullah, he asked them to stop and not to go to the well. On this Tufail Ahmad Khan asked his companions to beat Abdul Majid Khan and the men who were with him. Then Irshad Ullah fired. We have also the dying declaration of Abdul Majid Khan on this point. He says that Tufail Ahmad Khan said that before going to the well they should deal with Abdul Majid's party. The words used in the dying declaration are "*Inko bhi lelo*". The evidence further proves that Rashid Ullah Khan, Tufail Ahmad Khan and Nisar Khan used their lathis. Muhammad Umar Khan who had come with Rab Nawaz Khan to help Abdul Majid Khan was beaten and received lathi injuries.

On behalf of Nisar Khan *alibi* evidence was produced. \* \* \* \* \* We are satisfied that the defence of Nisar Khan is not true. We hold that all

these three appellants (appellants Nos. 2 to 4) took part in the fight.

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The learned counsel for the appellants has contended that Rashid Ullah Khan, Tufail Ahmad Khan and Nisar Khan have been wrongly convicted under sections 302 and 307 read with section 34 of the Indian Penal Code. His argument is that section 34 of the Indian Penal Code has no application to this case.

Section 34 of the Indian Penal Code lays down that when a criminal act is done by several persons, in furtherance of the common intention of all, each of those persons is liable for the act in the same manner as if it were done by him alone. The apparent simplicity of the language of this section has been found to be delusive. There are few other sections of the Indian Penal Code in the interpretation of which there has been so deep a divergence of opinion in all the High Courts in India as in the case of section 34 of the Indian Penal Code. In *Emperor v. Nirmal Kanta Roy* (1), STEPHEN, J., held that section 34 of the Indian Penal Code applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by some person other than the latter. In that case, two persons had fired at another. Only one hit the victim who was killed. The accused had not hit the deceased. STEPHEN, J., held that the accused could not be convicted under section 302 read with section 34 of the Indian Penal Code. This view is no longer good law. A Full Bench of the Calcutta High Court held in *Emperor v. Barendra Kumar* (2) that if several persons armed with pistols go to a place with the common intention of robbing a person and, if necessary, to kill him, and if one of them fires a fatal shot in furtherance of their common

(1) (1914) I. L. R., 41 Cal., 1072.

(2) (1923) 81 Indian Cases, 353.

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intention, then all of them are guilty of murder under section 302 read with section 34 of the Indian Penal Code. In this case the ruling in *Emperor v. Nirmal Kanta Roy* (1) was considered and not approved. The case of *Emperor v. Barendra Kumar* (2) went in appeal to the Privy Council. The judgment is re-reported in *Barendra Kumar Ghosh v. Emperor* (3). Their Lordships held that "section 34 of the Indian Penal Code deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself." "That act' and then again 'the act' in the latter part of the section must include the whole of the action covered by 'a criminal act' in the first part of the section." In the case of *Emperor v. Barendra Kumar* (2) RICHARDSON, J., who was one of the five Judges, made the following observations at page 404: "Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the meaning of section 34. If death followed the different acts of different confederates at the same time and place, then again section 34 would probably suffice. Every confederate would be regarded as having done every criminal act and would, therefore, be liable as if he had done them all alone."

In another case, *Emperor v. Ranchhod Sursang* (4), it was contended on behalf of the accused that section 34 of the Indian Penal Code was not applicable to a case where a criminal act in furtherance of the common intention of several persons was the act of a single individual. A Bench of two learned Judges of the

(1) (1914) I. L. R., 41 Cal., 1072.

(2) (1923) 81 Indian Cases, 353.

(3) (1924) I. L. R., 52 Cal., 197.

(4) (1924) I. L. R., 49 Bom., 84.

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Bombay High Court repelled this contention. They held that the fact that a criminal act done in the furtherance of the common intention of several persons was the act of a single individual does not render the provisions of section 34 inapplicable. Dealing with the view taken by STEPHEN, J., in the case of *Emperor v. Nirmal Kanta Roy* (1) and with another Calcutta case, *Emperor v. Profulla Kumar* (2), the following observations were made: "The learned Judges, however, seem to have overlooked section 9 of the Indian Penal Code which in my opinion would have removed the difficulty felt by STEPHEN, J. Section 9 runs as follows: 'Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.' If we then turn to section 34 and read it in the light of section 9, we can interpret it as follows: 'When a criminal act is done by one or more 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.'"

On a consideration of the authorities on the point we agree with the view taken in the Full Bench case of the Calcutta High Court in *Emperor v. Barendra Kumar* (3) and in *Emperor v. Ranchhod Sursang* (4). In our judgment the view that section 34 applied only where a criminal act was done by several persons of whom the accused charged thereunder was one, and not where the act was done by a person other than the latter, is not a correct view. We are of opinion that section 34 of the Indian Penal Code would be applicable equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of a single individual.

Before section 34 can be applied, the prosecution must prove that the criminal act was done by one of

(1) (1914) I. L. R. 41 Cal., 1072.

(2) (1922) I. L. R., 50 Cal., 41.

(3) (1923) 81 Indian Cases, 353.

(4) (1924) I. L. R., 49 Bom., 84.

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the accused persons in the furtherance of the common intention of all. The existence of a common intention is the sole test of the joint responsibility under section 34 of the Indian Penal Code. There are very few cases in which there is direct evidence of common intention. This must be gathered from the facts of each case and the surrounding circumstances. In this case we have no difficulty in determining the common intention of the accused persons. We find that it is established that Abdul Majid Khan was having one of the leased plots irrigated. Appellants Nos. 1 to 4 were seen going towards the well when Abdul Majid Khan and his two companions (Said Khan deceased and Said Khan P. W. 2) followed them and Abdul Majid Khan asked them to stop. According to the dying declaration of Abdul Majid Khan which we believe, Tufail Ahmad Khan asked Irshad Ullah Khan to deal with Abdul Majid Khan before going to the well. Upon this Irshad Ullah Khan fired at Abdul Majid Khan and appellants Nos. 2 to 4 joined the attack by using their lathis. What Tufail Ahmad Khan said to Irshad Ullah clearly shows that the common intention was to beat Abdul Majid and his men and to prevent him from irrigating one of the fields leased to him. Then, as pointed out by the learned Government Advocate, there is another point which shows the common intention of the appellants. When Irshad Ullah Khan fired at Abdul Majid Khan and wounded him, the other three accused made no attempt whatsoever to stop Irshad Ullah Khan from using his gun any further. On the other hand, they themselves started beating the men in the party of Abdul Majid Khan who had come to render help. We believe further that Irshad Ullah Khan was carrying a gun not for the purpose of shooting pigeons [which was the defence story] but to use, if necessary, to stop the irrigation. All the accused must have known that the gun might be used. On these facts we are of opinion

that section 34 of the Indian Penal Code is clearly applicable to the case of the appellants Nos. 2 to 4. For these reasons we hold that they had been rightly convicted by the court below.

The appeals of all the appellants are dismissed. We confirm the death sentence passed upon Irshad Ullah Khan and direct that it be carried out according to law. As regards the sentences against appellants Nos. 2 to 4 we direct that the sentences under section 307 will run concurrently with those under section 302 read with section 34 of the Indian Penal Code.

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*Before Mr. Justice King and Mr. Justice Iqbal Ahmad*

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EMPEROR v. SHIB LAL\*

*Indian Penal Code, sections 97, 99 and 326—Right of private defence of property against illegal attachment—Attachment of property under an invalid warrant—Does not amount to theft or robbery—"Good faith".*

Although an attachment of property made by an amin and his party under a time-expired warrant of attachment is illegal, such attachment does not amount to an offence of theft or robbery, there being no dishonest intention of causing wrongful gain or wrongful loss to any person; and no question of mischief or criminal trespass arises in such a case. Therefore, upon such attachment there is no right of private defence of property under the terms of section 97 of the Indian Penal Code.

If, however, a right of private defence of property had accrued in such a case, it would not have been taken away by section 99 of the Indian Penal Code, as the amin, in acting under a time-expired warrant, could not be deemed to have acted "in good faith", as defined in the Indian Penal Code.

Where an amin with a party of constables, mukhia and patwari went to a village to make an attachment, but the warrant had become invalid by lapse of the time limited thereby, and the owner of the property resisted and caused grievous hurt to one of the party, it was *held* that he could not plead any right of private defence of property and was rightly convicted under section 326 of the Indian Penal Code.

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\*Criminal Appeal No. 767 of 1932, by the Local Government, from an order of K. N. Wanchoo, Sessions Judge of Muttra, dated the 8th of July, 1932.