

where the question is whether the property once belonging to her husband is part of his estate or is part of the widow's estate, which itself implies an estate carved out of the husband's estate. It continues to be the husband's estate while it is in the possession of the widow who represents it. If the observation quoted above had embodied the decision of their Lordships for the purposes of that case, we would have referred the question to a larger Bench. As in our opinion it is clearly an *obiter dictum* which was not part of the actual decision of the case, we feel, with all respect, that we are at liberty to differ from it.

In the case before us, it is not disputed that the appellants are in possession of the property, of which the rents are in question, as the heirs and legal representatives of their deceased husband against whom the decree sought to be executed had been passed. This being so, the rents attached at the instance of the decree-holder are, in our opinion, part of the estate of the deceased. The objection of the appellant was rightly overruled by the lower court. This appeal is dismissed with costs.

APPELLATE CRIMINAL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

EMPEROR *v.* GIRJA PRASAD AND OTHERS*

Indian Penal Code, sections 111, 114—Abetment—Instigation of one act and unforeseen commission of another—Probable consequence of incitement—Knowledge of abettor—Joint commission of offence—Taking part in assault during which sudden and unforeseen stabbing by co-accused—Whether guilty of murder or abetment of murder—Indian Penal Code, section 34—Interpretation of statutes—Penal statutes.

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One Bhagwati, who was a servant of two brothers Girja and Bishnath, was surprised stealing mangoes from Barka's father's grove and was pursued by Barka, a youth of about 17, up to the house of Girja and Bishnath who were met with outside the

*Criminal Appeal No. 700 of 1934, from an order of L. V. Ardagh, Sessions Judge of Benares, dated the 14th of August, 1934.

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house. Girja had a stick or lathi in his hand. An altercation ensued, in the course of which Bishnath shouted "*Maro sale ko, tab hi manega*". Barka ran off but was pursued by the others and was caught by Bhagwati; when Girja came up to them he suddenly whipped out a spear head from the pocket of his *kurta* and fatally stabbed Barka, and thereupon all the assailants ran away. Bishnath or Bhagwati had no knowledge that Girja had this weapon on his person and might use it. Held, that Bishnath and Bhagwati were not guilty of murder or of abetment of murder, but only of abetment of assault under section 352 of the Indian Penal Code. In the circumstances of the case the words "*Maro sale ko*" were an instigation to chastise or thrash Barka, a boy who was being impertinent and offensive, and no more; they did not amount to an instigation to murder or cause grievous injuries.

Under section 111 of the Indian Penal Code an abettor may be liable for the commission of a different act than the one he instigated, provided the different act was a probable consequence of the abetment and was committed under the influence of the instigation. A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such act; an unusual or unexpected consequence can not be described as a probable one. When the act done is different from the act instigated, an abettor is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation. In the present case the act contemplated and instigated was no more than a thrashing with a lathi, which Girja had in his hand; the lathi was not used at all, but a wholly unexpected and unforeseen stabbing took place with a hidden spear head; the case did not come within the words of section 111.

It is a well established rule of construction that words in a statute creating a criminal offence must be construed strictly.

A person who unknowingly assists in the commission of a crime is not himself guilty of that crime or of aiding and abetting it. In the present case Bhagwati held Barka and thereby assisted in the commission of the crime, but he neither intended nor knew that murder would be committed. Had he been aware that Girja had the spear head with him and was likely to use it, he might properly be held liable for murder or for abetment of murder. Further, it was not shown that Bhagwati held Barka a moment after he realised that Girja

had this weapon and was about to use it; the incident was so sudden and unexpected. In the circumstances the only offence committed by Bhagwati was abetment of assault.

Dr. S. N. Sen, and Mr. K. O. Carleton, for the appellants.

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

HARRIES AND RACHHPAL SINGH, JJ.:—The appellants Girja Prasad and Bhagwati were charged before the Sessions Judge of Benares under section 302 of the Indian Penal Code, with the murder of a youth named Barka alias Adit Prasad at the village of Marwi on the 16th of May, 1934. The appellant Bishnath was charged with aiding and abetting the murder or the infliction of grievous hurt on Barka, contrary to section 114 of the Indian Penal Code read with section 302 and section 325 of the Indian Penal Code. All the appellants were convicted, Girja Prasad being sentenced to death whilst Bishnath and Bhagwati were sentenced to transportation for life. Against these convictions and sentences all the appellants have preferred appeals to this Court.

There can be no doubt that the deceased Barka met his death by violence. The post mortem report and the unchallenged evidence of Major Culhane, the Civil Surgeon of Benares, prove conclusively that the death was due to a stab in the abdomen. The only issues for the decision of this Court are, who stabbed the deceased, and the parts played by the various appellants in the incident.

The case for the prosecution can be stated shortly as follows. The deceased was a youth of about 17 years of age who lived with his father Shiam Narain in the village of Marwi. With them lived Shiam Narain's cousin Udai Narain, who, it is suggested, held a grove of mango trees jointly with Shiam Narain. The appellants Girja Prasad and Bishnath are brothers who also lived in the village and in their service was the appel-

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lant Bhagwati. On the 16th of May, 1934, a few hours after sunrise, it is alleged that the deceased Barka surprised Bhagwati stealing mangoes from the grove already referred to. Barka protested and demanded the mangoes, but Bhagwati refused to hand them over to him. Bhagwati made off towards the house of his master closely followed by Barka. Outside the house were the appellants Girja Prasad and Bishnath and there a further altercation ensued, and it is to be noted that at this time Girja Prasad was wearing a *kurta* and was holding in his hand a *danda* or lathi. The altercation seems to have angered Bishnath who shouted to the others "*Maro sale ko, tab hi manega.*" Upon these words Bhagwati and Girja Prasad ran towards the deceased Barka who promptly fled. He was caught by Bhagwati who held him when Girja Prasad came up. The latter, when he reached Barka, suddenly whipped out a spear head about 8 or 9 inches long from the pocket of his *kurta* and drove it into the abdomen of the unfortunate deceased, and thereupon all of them fled.

[The judgment then referred to the evidence in detail, and proceeded.]

Giving full weight to the very forcible and able arguments which were addressed to us by Dr. *Sen* on behalf of the appellants, we cannot accept the defence version of the affair and in our judgment it is established beyond all reasonable doubt that the version of the affray given by the prosecution is the true one. That being so, it is necessary to consider separately the part played by each individual appellant in order to ascertain what offence, if any, was committed by each of them.

Girja Prasad: This appellant dealt the fatal blow in circumstances which did not justify him in using any force whatsoever towards the deceased Barka. He used a lethal weapon, namely a spear head, and directed the blow at the deceased's abdomen which he must have known was a vital part of the human body. As death

resulted from this stab, it is clear that he is guilty of murder under section 302 of the Indian Penal Code and his learned counsel very frankly admitted that if the version of the prosecution was held to be true he could not contend otherwise. We therefore affirm the conviction of Girja Prasad for murder. The murder, however, was not a premeditated one but was the result of anger and passions engendered in a sudden quarrel and therefore in our view it is not a case where a sentence of death is necessary in the interests of justice. We are of opinion that a sentence of transportation for life is adequate to meet this case and we therefore substitute that sentence for the sentence of death passed upon this appellant. To this extent only the appeal of Girja Prasad is allowed.

Bishnath: This appellant was found guilty of abetment of murder and sentenced to transportation for life. The learned Sessions Judge held that the words used by this appellant, namely "*Maro sale ko*", were an instigation or incitement to Girja Prasad to commit murder or at least to inflict such injuries as might in the ordinary course of nature cause death. We find it impossible to agree with this view. The words "*Maro sale ko*" addressed by this appellant to Girja Prasad and Bhagwati did not, in our view, amount to an instigation to murder or cause grievous injuries in the circumstances in which they were used. They were an instigation to chastise or inflict corporal punishment on the deceased Barka and no more. The words in certain circumstances may be capable of a more serious meaning, but we are satisfied that in the circumstances of this case they were nothing more than an instigation to chastise or thrash a youth who, *Bishnath* thought, was being impertinent and offensive.

In consequence, however, of *Bishnath*'s words *Bhagwati* and *Girja Prasad* did pursue and catch *Barka* and whilst the latter was being held by *Bhagwati* he was fatally stabbed by *Girja Prasad* with a spear head which.

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up to the moment it was used, had been concealed in the pocket of his *kurta*. There is absolutely no evidence to show that Bishnath knew that Girja Prasad had this spear head on his person at that particular time, and indeed the evidence in the case points to the contrary. At the time that Bishnath addressed the words to his co-appellants, Girja Prasad was holding a *danda* or lathi in his hand and the probabilities are that Bishnath intended Girja to use that *danda* or lathi to chastise or thrash Barka. It was for this reason that the learned Sessions Judge held Bishnath guilty of abetment of murder. A lathi, according to him, is a lethal weapon, and inciting a person to beat another with a lathi is an instigation to murder where death ensues. In certain circumstances it may well be so, but upon the facts of this case as we find them to be, the instigation was only to chastise or thrash with a lathi or other similar instrument and not to cause death or serious injuries. In any event a lathi was not used by the person instigated but a far more dangerous weapon, the existence of which, we hold, was not known to the instigator Bishnath. The reasons, therefore, given by the learned Sessions Judge for convicting Bishnath of abetment of murder cannot be supported. Holding as we do that the instigation was merely to chastise or thrash, can it be said that Bishnath is liable for abetment of murder merely because murder was committed within a few moments by one of the persons to whom the inciting remark was addressed?

The act of stabbing with a spear head was a very different act from the actual act which Bishnath contemplated and instigated. At the highest he incited no more than a thrashing with a lathi, yet Girja Prasad, the person incited, committed murder by stabbing the deceased with an obviously deadly weapon.

By reason of section 111 of the Indian Penal Code an abettor may be liable for a different act than the one he instigated, provided the different act was a probable consequence of the abetment and was committed under

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the influence of the instigation. Had Girja Prasad used the lathi which he held in his hand at the time Bishnath shouted "*Maro sale ko*" and killed Barka with it, it might be argued that Bishnath is liable for abetment of an offence under section 302 or 304 of the Indian Penal Code by reason of the provisions of section 111 of the Indian Penal Code, but as a lathi was not used the point does not arise for decision in this case. Instead of a lathi a very different and far more dangerous weapon was used, and at the time of the instigation to thrash the deceased Bishnath was wholly unaware of its existence. In our judgment Bishnath can only be convicted for abetment of murder if the use of the spear head was a probable consequence of the shout "*Maro sale ko*" and the blow was struck under the influence of the instigation. Having regard to the fact that the stab with the spear head followed immediately after Bishnath's shout "*Maro sale ko*", it might well be argued that the act of stabbing was committed under the influence of the instigation, but even so that is not enough to make Bishnath liable. The act of stabbing being a different act from the act of thrashing which was the act instigated, the prosecution must show not only that the act of stabbing was committed under the influence of the instigation but also that it was a probable consequence of the instigation to thrash.

A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act. An unusual or unexpected consequence cannot be described as a probable one. When the consequence of an act is such that a reasonable man could not be expected to foresee that it would follow from such an act, such consequence cannot be described as a probable one. On the contrary it can only properly be described as an unexpected, unlikely or improbable consequence.

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strued strictly. In our judgment a wider meaning to the phrase "probable consequence" in section 111 of the Indian Penal Code should not and cannot be given, otherwise it would be impossible to fix any limits to an abettor's liability. When the act done is different from the act instigated, an abettor, in our view, is only liable for such a different act if it was a likely consequence of the instigation or if it was an act which the instigator could reasonably have been expected to foresee might be committed as a result of his instigation.

In this view we are supported by a single Judge decision of this Court in the case of *Queen-Empress v. Mathura Das* (1). In that case two appellants conspired at a robbery to be committed by a third appellant. In the robbery excessive violence was used which resulted in the death of the person robbed. STRAIGHT, A.C.J., whilst upholding the conviction of the third appellant for murder held that the other two appellants were not guilty of abetment of murder but only of the offence of abetment of robbery, on the ground that the excessive violence used was not a likely consequence of the instigation but on the contrary it was a most unexpected one and one which the two appellants could not reasonably have been expected to foresee.

In our judgment the use of the spear head by Girja Prasad was not a probable consequence of anything said or done by Bishnath but a most unexpected and unusual consequence and therefore his conviction for abetment for murder cannot be sustained. What he did was to instigate an offence under section 352 of the Indian Penal Code, namely an assault on the deceased Barka and though something wholly unexpected and far more serious was done, his liability is for instigating that offence and that offence alone. We therefore set aside the conviction and sentence of transportation for life passed on this appellant and convict him of the offence of abetment of an assault contrary to sections 109 and

(1) (1884) I.L.R., 6 All., 491.

114 of the Indian Penal Code read with section 352 of the Indian Penal Code and sentence him to three months' rigorous imprisonment. To this extent the appeal of Bishnath is allowed. The sentence of three months will run from the date of conviction, which means that this appellant has already served the period and must be released forthwith.

Bhagwati: The appellant Bhagwati actually assisted in the commission of murder, but it does not follow that he is guilty of murder or of aiding or abetting it. A person who unknowingly assists in the commission of a crime is not himself guilty of that crime or of aiding or abetting it.

It must be remembered that Bhagwati was a servant of Bishnath and Girja Prasad and therefore when Bishnath shouted "*Maro sale ko*" it was, as far as Bhagwati was concerned, an order to chastise or beat the deceased. In obedience to that order Bhagwati pursued Barka, caught him and held him for a beating by Girja Prasad. The latter, however, did not beat him but suddenly produced the spear head from his pocket and plunged it into the deceased. Had Bhagwati been aware that Girja Prasad had this spear head in his possession and was likely to use it he might properly be held liable for murder or for abetment of murder. There is, however, no evidence whatsoever which suggests that Bhagwati knew that Girja Prasad had this weapon in his clothing or that when he caught and held the deceased he knew that Girja Prasad was about to do anything more than to beat the unfortunate Barka. Further, there is no evidence to suggest that Bhagwati held the deceased a moment after he realised that Girja Prasad had this spear head and was about to use it. The whole incident happened in a moment of time and in our judgment it is highly probable that Bhagwati knew nothing of the spear head until it was actually used and then it was too late for him to do anything. In these circumstances, therefore, it cannot be said that Bhag-

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wati knowingly held the deceased Barka for any purpose other than chastisement. He abetted Girja Prasad to commit an assault, but the latter actually committed a wholly different act, namely a murderous attack. In our judgment Bhagwati is not guilty of the abetment of that murderous attack but is only guilty of abetment of an ordinary assault punishable under section 352 of the Indian Penal Code.

The learned Sessions Judge convicted Bhagwati because of the construction he placed on the words "*Maro sale ko*", and if those words had, in the circumstances, actually amounted to an instigation to kill, it would not matter whether the actual killing was done with a lathi or with a spear head. However, having regard to the view we take of the meaning of the phrase "*Maro sale ko*" in the circumstances in which it was used, and of the law as we have stated it, this conviction of Bhagwati for murder cannot be sustained. Bhagwati is however guilty of abetment of an assault, but in our view his degree of guilt is less than that of Bishnath. He was a servant carrying out his master's instructions and though that affords no defence, it is, in our view, in this case a mitigating circumstance. We therefore set aside the conviction and sentence of transportation for life passed on this appellant and convict him of abetment of assault contrary to section 109 and section 114 read with section 352 of the Indian Penal Code and sentence him to one month's rigorous imprisonment. To this extent the appeal of Bhagwati is allowed. The sentence of one month's rigorous imprisonment will commence from the day of his conviction, which means that Bhagwati has already served that period and must be released forthwith.