APPELLATE CRIMINAL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke

1938 October, 12

RAJA RAM AND OTHERS (APPELLANTS) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENTS)*

Penal Code (Act 45 of 1860), sections 34 and 302—Infliction of blow on head with lathi *causing fracture of skull and death —Offence, whether murder—Section 34, I. P. C., application of—"Common intention" must be the intention to commit the crime actually committed—Common intention of party to cause to give beating with* lathi*—One member committing murder—Other members of party guilty of abetment of an offence to cause grievous hurt and not murder.*

A *lathi* is a lethal weapon and anyone who uses it on the head of another with such force as to fracture the skull must know that he was doing an act which in all probability must cause death. The infliction of a single blow on the head which fractures the skull and results in the death of that person will amount to murder, and not merely culpable homicide. *Sarju Prasad* v. *King-Emperor* (1), *Sheo Prasad* v. *King-Emperor* (2), and *Amarnath Singh* v. *King-Emperor* (3), referred to.

Section 34, I. P. C. is not restricted to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them. It can well be applied to cases in which the offence is committed by only one of two or three persons who all had a common intention. The real test is the common intention. The "common intention" referred to in the section is an intention to commit the crime which is actually committed. *Lachho Singh* v. *Emperor* (4), *Harihar Singh* v. *Emperor* (5), *Emperor* v. *Sada Singh* (6), *Nga E.* v. *Emperor* (7), and *Nga Tha Aye* v. *Emperor* (8), referred to.

Where the common intention of a party of men is to give a beating with *lathis* to another and one of them actually commits murder though the act of murder might have been done with the aid of the other members of the party it cannot be said as a probable consequence of the abetment on their part and they are guilty only of abetment of an offence under section 325, I. P. C., and not murder.

*Criminal Appeal No. 233 of 1938, against the order of N. Storr, Esq., Sessions Judge of Sitapur, dated the 1st July, 1938.

(1) (1926) 3 O.W.N., 451.
(2) (1927) 4 O.W.N., 445.
(3) (1928) 5 O.W.N., 391.
(4) (1917) 18 Cr. L.J., 382.
(5) (1925) 26 Cr. L.J., 1498.
(6) (1931) 32 Cr. L.J., 56.
(7) (1930) I.L.R., 8 Ran., 693.
(8) (1935) 36 Cr. L.J., 1389.

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Dr. *J. N. Misra,* and Mr. *K. P. Misra,* for the appellant.

Government Advocate, for the crown.

ZIAUL HASAN and YORKE, JJ.:—Three Brahman brothers, Raja Ram, Shco Prasad and Sarda residents of village Ataura, police station Tambaur, district Sitapur, have been convicted by the learned Sessions Judge of Sitapur under section 302, I. P. C. read with section 34, I. P. C. and sentenced to transportation for life. They bring this appeal against their conviction and sentences.

According to Mst. Keoli P. W. 1, widow of the deceased Gokaran, Raja Ram was formerly the priest of her husband's family. In April, 1938, Gokaran wanted to build a new house and for that purpose he asked Raja Ram to fix an auspicious date and to perform the opening ceremony of the house. He accordingly fixed a date which he said was auspicious and also told him the fee he would charge for performing the opening ceremony. Gokaran however consulted another Pandit named Bhola who told him that the day fixed by Raja Ram was not at all auspicious and he also offered to perform the opening ceremony on a lower fee. Gokaran accepted Bhola's terms and got the opening ceremony performed by him on the 15th April, 1938. This displeased Raja Ram and on the 16th April, 1938, at about midday he is said to have appeared along with his brothers Sheo Prasad and Sarda at Gokaran's door and to have called him out. It is said that Raja Ram was armed with a *lathi* and the other two with *kantas*. Gokaran who was in the house did not respond through fear and then the three accused rushed into the house, Sheo Prasad and Sarda dragged him to the courtyard of the house and Raja Ram gave him a *lathi* blow which felled him down. Sheo Prasad and Sarda are then said to have beaten him with kicks and fists. Mst. Keoli tried to intervene but, it is said, Sarda aimed a blow at her with his *kanta*. She how-

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ever got behind a corn-bin and the *kanta* fell on the bin. On the outcry raised by Keoli some people of the village arrived and then the three assailants went away. The deceased, who was at the time able to walk, started for the police station accompanied by his brother Badri and his wife Keoli but after going a short distance he was unable to proceed further and the party returned to the village. Some time after they engaged a cart, put Gokaran on it and set out for the police station. The thana is six miles from the village and the party reached the police station at about 10 p.m. but Gokaran died a short distance away from it. A report was lodged by Mst. Keoli in which she gave the above facts in detail. Investigation followed and all the three appellants were prosecuted under section 302, I. P. C.

In the court of the Committing Magistrate all the three accused raised pleas of alibi but in the Court of Session while Sarda and Sheo Prasad stuck to the plea of alibi, Raja Ram stated that what he had stated in the court of the Committing Magistrate was not true but that a quarrel did ensue between him and the deceased on the latter's buffalo grazing his field. He stated that on his asking Gokaran to tie up the buffalo, Gokaran used abusive language towards him and also attacked him with *lathi* but he parried Gokaran's blow and gave him a blow with his own *lathi*. He stated that his brothers were not present at the time of the occurrence. Witnesses were produced in support of his defence by each of the accused but the learned Judge disbelieved their evidence and holding the prosecution case to be true convicted the appellants.

Three witnesses Bishun Kumar, Geneshī and Chhutkau were produced to prove the defence version of the fight between the deceased and Raja Ram but the learned Judge was in our opinion right in rejecting their evidence. They were cited in the court of the Committing Magistrate where the only plea taken by Raja Ram was one of alibi but in the Court of Session

they were produced to depose to the manner in which, according to Raja Ram, a fight ensued between him and the deceased. Two witnesses Parag and Tirjugi Narain tried to prove that on the day of the occurrence they and Sheo Prasad accused were engaged from morning till evening in cutting the crops of some fields but it is strange that though the fields which they were harvesting were only at a short distance from Ataura, the witnesses did not hear any uproar at the time of the occurrence. The sixth and last witness Tirbeni wants to prove that Sarda accused stayed in the village of Naribehar which is close to his own village Bilauli at the house of one Barmahdin Dube for about a month and two days. This is hardly sufficient to prove that Sarda was not present in Ataura on the date of the occurrence specially when the witness cannot say when Sarda visited Naribehar before this. The learned Judge was in our opinion right in rejecting the evidence of the defence witnesses. In fact, the learned counsel for the appellants himself did not place much reliance on it.

Turning now to the prosecution evidence, we find that though Mst. Keoli P W. 1, is wife of the deceased and Badri P. W. 4, is his brother, Rameshwar P. W. 2, and Shankar P. W. 3 are perfectly independent and as admittedly there was no previous enmity between the accused and Keoli or Badri, there is no reason to disbelieve Keoli and Badri also on the main facts. The evidence of these four witnesses proves to our satisfaction that the deceased was given a *lathi* blow on the head by Raja Ram after he was dragged out into the courtyard by Sheo Prasad and Sarda. It is also proved by these witnesses that Gokaran himself named the present appellant as his assailants. We are not however prepared to believe that Sheo Prasad and Sarda were armed with *kantas* as they made no uss of them. Similarly we doubt the truth of the statement that Sheo Prasad and Sarda gave kicks and fist blows to the deceas-

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ed after he fell down on being hit on the head by Raja Ram with his *lathi*. The medical evidence shows that the deceased had only one contused wound $2'' \times \frac{3}{4}''$ scalp deep on the top of the head. The second injury mentioned in the *post-mortem* report, namely, the whole of the scalp being ecchymosed and swollen was manifestly a consequence of the contused wound. The inquest report Ex. 2 also shows no more than one injury on the top of the head. We are of opinion that the intention of the appellants was not to kill Gokaran but to give him a thrashing, but nevertheless so far as Raja Ram is concerned there can be no doubt that he was guilty of murder and not of culpable homicide not amounting to murder as his learned counsel argued. A *lathi* is a lethal weapon and anyone who uses it on the head of another with such force as to fracture the skull must know that he was doing an act which in all probability must cause death. The cases of *Sarju Prasad* v. *King-Emperor* (1), *Sheo Prasad* v. *King-Emperor* (2), and *Amarnath Singh* v. *King-Emperor* (3) are all cases in which the infliction of a single blow on the head which fractured the skull was held to amount to murder.

The real question in the case is about the guilt of Sheo Prasad and Sarda. We have already said that they not only accompanied their brother Raja Ram to Gokaran's house but dragged him out into the court-yard after which Raja Ram gave him a *lathi* blow. We do not however think that section 34, I. P. C. can be applied to Sheo Prasad and Sarda. It has sometimes been held that section 34 was framed to meet a case in which it may be difficult to distinguish between the acts of individual members of a party or to prove exactly what part was taken by each of them but the section is not in our opinion restricted to such cases only and it can well be applied (and has been applied)

(1) (1926) 3 O.W.N., 451. (2) (1927) 4 O.W.N., 445.
(3) (1928) 5 O.W.N., 391.

to cases in which the offence was committed by only one of two or three persons who all had a common intention. We may cite as examples the cases of *Lachho Singh* v. *Emperor* (1), *Harihar Singh* v. *Emperor* (2), *Emperor* v. *Sada Singh* (3) and *Nga E.* v. *Emperor* (4). The real test in our judgment is the common intention. The "common intention" referred to in section 34 is an intention to commit the crime actually committed as was held in *Nga Tha Aye* v. *Emperor* (5). Therefore only those persons can be held liable under section 34 who had a common intention to commit the crime which was actually committed. In *Empress* v. *Dharam Rai* (6) MAHMOOD, J., referring to the change brought about in section 34, I. P. C. by Act 27 of 1870 remarked:

> "This change in the law is very significant, and it indicates to my mind that the original section having been found to have been somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate persons who took no part in that particular act."

Again referring to section 149 he said—

> "I have referred to this section (section 149) to show that it is more strongly worded than section 34; and even upon this section a Full Bench of the Calcutta High Court in *Queen* v. *Sabed Ali* (7) held that any sudden and unpremeditated act done by a member of an unlawful assembly would not render all the other members liable therefor, unless it was shown that the assembly did understand and realize either that such offence would be

(1) (1917) 18 Cr. J.J., 382. (2) (1925) 26 Cr. L.J., 1498.
(3) (1931) 32 Cr. L.J., 56. (4) (1930) I.L.R., 8 Ran., 603.
(5) (1935) 36 Cr. L.J., 1380. (6) (1887) Weekly Notes, 236.
(7) (1873) 11 Ben. L. R., 347.

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committed or was likely to be necessary for the common object."

At page 67 in Ratan Lal's Law of Crimes, 14th edition, it is said—

"To establish guilt under section 34, it is necessary to prove a common intention as distinguished from a common object as in section 149 and it must be shown that the criminal act was committed in furtherance of that intention."

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Similarly in *Nga E.* v. *Emperor* (1) it was held that a common intention is an intention to commit the crime actually committed and each accused person could be convicted of that crime only if he had participated in that common intention. As we have held that the common intention of the three appellants was not to kill Gokaran but to give him a beating, Sheo Prasad and Sarda cannot be held guilty of murder under section 34, I. P. C.

The case of Sheo Prasad and Sarda in our opinion comes under section 111, I. P. C. which runs as follows:

"When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it:

"Provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment."

As the intention of the appellants appears to have been to give Gokaran a beating with *lathis*, Sheo Prasad and Sarda in reality abetted an offence under section 325, I. P. C. and though the act of murder committed by Raja Ram was done with the aid of Sheo Prasad and Sarda it cannot in our opinion be said that it was a probable consequence of the abetment on their part.

(1)(1930) 8 Rang., 603.

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In the case of *Bahal Singh* v. *Emperor* (1) two persons armed with deadly weapons made an attack upon another and it was proved that death was caused by a blow inflicted by only one of them. Sir HENRY RATTIGAN, C. J. and ABDUL RAOOF, J. of the Punjab Chief Court held that the one who struck the blow was guilty of murder and the other who must have known that grievous hurt would in all probability be caused is guilty of having abetted an offence under section 325, read with section 109, I. P. C. Although in this case the learned Judges interpreted section 34 as meaning that the criminal act must be done by all the accused, a view with which with respect, we disagree, it is clear that the accused who did not strike the deceased was held to have abetted an offence under section 325 and not murder.

We therefore dismiss the appeal of Raja Ram but accept that of Sheo Prasad and Sarda in so far that we alter their conviction from one under section 302/34, I. P. C. to one under section 325 read with section 109, I. P. C. and reduce their sentences to rigorous imprisonment for three years each.

Appeal partly allowed.

APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and Mr. Justice Ziaul Hasan

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BABU RAJA MOHAN MANUCHA AND OTHERS (APPLICANTS) v. BABU MANZUR AHMAD KHAN AND OTHERS (OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), Order 45, rule 7—Privy Council Rules, rule 9—Court's power to extend time for filing security or making up deficiency in it.

Under rule 9 of the Privy Council Rules the Chief Court of Oudh has full discretion to extend the time for filing the security in a Privy Council Appeal or to extend the time to make good the deficiency in the security.

*Privy Council Appeal No. 16 of 1937, for leave to appeal to His Majesty in Council.

(1) (1919) 20 Cr. Law J., 711.