

the respondents on this point and there is no doubt whatever that if the will was in fact executed by Nand Kumar Lal, then it completely establishes the case of the plaintiffs as to separation; but the signature cannot be identified with the admitted signature of Nand Kumar and the expert evidence has failed to establish that the thumb impression appearing in this document is the thumb impression of Nand Kumar. In these circumstances it would not be safe to rely upon the will; but in my opinion the rest of the evidence which I have considered is sufficient to establish the plaintiffs' case.

In my opinion the conclusion at which the learned Subordinate Judge has arrived is clearly right and I must dismiss this appeal with costs.

ALLANSON, J.—I agree.

S. A. K.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Terrell, C.J. and Macpherson, J.

SHAFI KHAN.

v.

KING-EMPEROR.*

1928.

BALMANTOND
LAL

MUSANMAT
SQRANO
KUREL.

DAS, J.

1928.

June, 25.

Sentence—several persons convicted of rioting and murder—principles governing award of punishment.

Where several persons are convicted of rioting and of murder committed in prosecution of the common object of the rioters, prima facie all the persons so convicted should be sentenced to the extreme penalty. It is only when special circumstances are shewn to exist in favour of any individual that the alternative punishment of transportation for life should be substituted for sentence of death.

*Death Reference no. 11 of 1928. Criminal Appeal no. 119 of 1928, against a decision of A. C. Davies, Esq., I.C.S., Sessions Judge of Shahabad, dated the 18th May, 1928.

1928.

SHAFI KHAN
v.
KING-
EMPEROR.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C. J.

Hyder Imam and J. N. Sahai, for the appellants.
Assistant Government Advocate, for the Crown.

COURTNEY
TERRELL,
C.J.

COURTNEY TERRELL, C.J.—In this case the 18 accused persons were convicted by the Sessions Judge of Shahabad under section 302 of the Indian Penal Code of the murder of constable Maruf Khan. They were also convicted under sections 147 and 148 of the Indian Penal Code. Two of the prisoners Shafi Khan and Ishaque Khan have been sentenced to death; the remainder to transportation for life.

All the prisoners live in village Koshahri and they consist of two groups. The first group comprises a number of Muhammadans and the statement of the Sessions Judge sets forth their relationship. Shafi (no. 1), Ishaque (no. 2) and Rauf (no. 3) are full brothers. Suleman (no. 4) is their nephew. Sahid (no. 5) is the step-son of Shafi. Amir Ali (no. 9) and Imam Ali (no. 10) are full brothers and Amir Ali is the maternal uncle of Ishaque. Shakur (no. 11) and Gaffur (no. 12) are sons of Amir Ali (no. 9). Shahriar (no. 13) is the son of Ishaque. This concludes the enumeration of the first group. The second group consists of Rajpati Bhar (no. 6), Jangi Bhar (no. 7), Jamuna Nonia (no. 8), Sheochand Nonia (no. 14), Sarju Nonia (no. 15), Dudhnath Nonia (no. 16), Deoraj Bhar (no. 17) and Pariag Nonia (no. 18). They are Nonias and Bhars by caste and are said to be the friends and associates of Shafi Khan (no. 1).

The accused Shafi and Ishaque have long been suspected and with good reason as dangerous criminals implicated in various dacoities and robberies. They have long held a certain position of pre-eminence in their village, Shafi having been at one time a member of the caukidari committee and Ishaque having been daffadar of the circle. From these posts they were removed in 1924 in consequence of their bad reputation and a new chaulkidar was eventually appointed

in the person of the accused Amir Ali (no. 9), the uncle of Shafi and Ishaque. He in turn was dismissed after a police report and Shafi was placed on the police surveillance list and in May, 1927, on the special picketting list. In September, 1927, one Sitaram Koeri of the same village lodged a first information relating to the theft of a bullock and stating that he suspected Shafi and his associates Jamuna (no. 8), Rajpati (no. 6), Deoraj (no. 17) and Sheo-chand (no. 14). The matter was investigated; proceedings were ordered under section 110 of the Indian Penal Code and a warrant for the arrest of Shafi was issued by the Subdivisional Magistrate on October 3rd and entrusted to the Sub-Inspector Sital Prasad. He was duly arrested but later released on bail and the trial began at Buxar. In the course of the proceedings the Subdivisional Magistrate decided to examine local witnesses at Sareangea near Kochahri but on the day appointed for the examination, the 16th November, the Subdivisional Magistrate was ill and could not attend. The prosecution witnesses and Shafi were however present. One of the prosecution witnesses, a person named Ram Birich Rai of Sareangea, on the 21st lodged an information at Rajpur thana charging Shafi and Ishaque and other persons unknown with the theft of six bullocks which he alleged to have been stolen from his khand on the previous night, the 20th, and further stating that his servant had reported that he (the servant) had been attacked by the thieves and recognised the prisoners Shafi and Ishaque. The first information was recorded by writer head constable Ramlal Tewari, the Sub-Inspector Sital Prasad being absent at the time. Ramlal Tewari proceeded with constables Chand Khan, the daffadar Singasan Rai and a chaukidar Kaulesar Ahir to village Sareangea to begin the investigation and remained there for the night. When the Sub-Inspector returned to the thana on the evening of the 21st he saw the entry of the first information and early the next morning he sent the constable Maruf Khan, constable Chandrika

1928.

SHAFI KHAN
v.
KING-
EMPEROR.COURTNEY
TERRELL,
C. J.

1928.
 SHAFI KHAN
 v.
 KING-
 EMPEROR.
 COURTNEY
 TREWELL,
 C. J.

Misser and a daffadar Lachmi Singh to Kochahri to arrest Shafi and Ishaque. He gave a command certificate to the constables. Two hours later he himself set out taking with him a shot gun and six cartridges. He arrived at Sareangea at about 8-30 where he found the writer head constable, the constable Chand Khan, the daffadar and the chaukidar. He heard an outcry from Kochahri which is a short distance from Sareangea that the constables he had sent had been beaten. He went at once to Kochahri accompanied by the party he had joined and accompanied also by Ram Birich Rai who had complained of the theft of the bullocks and by two other persons Amir Lal and Shyam Narain Singh of Sareangea. On arrival at Kochahri he met the constables Chandrika Misser, Maruf Khan, the daffadar Lachmi Singh and the chaukidar Raghunandan Dusadh near the canal bridge to the west of Kochahri. Maruf Khan had his arm broken and bound in a sling. The other constable had marks of lathi blows. It appears that these constables had entered the village and had found the prisoner Shafi at a well. Maruf Khan told Shafi that he had orders to arrest him and Ishaque. Shafi refused to submit to arrest. Shafi's brother, the accused Rauf no. 3, struck Maruf Khan. Rauf cried out " We won't let him be arrested " and seized hold of Chandrika Misser and then about 14 or 15 men including the prisoners Suleman, Shakur, Ishaque and Amir Ali ran up with lathis and beat the constables inflicting the injury I have mentioned, whereupon the constables retired to the bridge where they met the Sub-Inspector. After taking the statement of the constables and recording a first information the Sub-Inspector with the whole party went up the village lane in the direction of Shafi's house which lies to the extreme east of the village for the purpose of investigating the matter of the theft of the bullocks and the rescue of Shafi and of arresting Shafi and Ishaque. As they went along and reached an open space they were suddenly attacked by a large mob of persons, who had been concealed

behind the houses, who appeared in front of them and attacked the Sub-Inspector's party and at the same time a smaller mob attacked the police from behind. The smaller mob in the rear were armed with lathis but the two prisoners Amir Ali and Shahriar were armed with bows shooting clay bullets. In the mob in front were the remaining 16 persons. Rauf, Ishaque, Suleman and Jamuna were armed with spears and the others with lathis and the spearmen were in front but Shafi, who was armed with a lathi, was also in front. Both mobs attacked the police simultaneously. The constable Maruf Khan who had already had his arm broken and appears to have been a brave man was unarmed but nevertheless he stepped in front of the Sub-Inspector and tried to remonstrate with the mob. He was, however, immediately struck down by a spear wound in the chest and a lathi blow on the head each of which wounds separately was of a fatal character. In spite of the death of Maruf Khan the attack by the mob was continued but the lane was narrow and the constables, chaukidars and daffadars parried the thrusts of the spears and defended themselves from the lathi blows to the best of their ability and the Sub-Inspector exercising commendable restraint used his gun as a stick to ward off blows. At length, however, the Sub-Inspector saw that his life and the lives of his men were in danger and he aimed his gun at the mob in front. They immediately hid behind the buildings to left and right and the Sub-Inspector fired two shots into the air. But when they saw that no one was hit they came out from behind the buildings and again attacked the Sub-Inspector and his party with spears and lathis. The Sub-Inspector then fired two shots into the mob and wounded the prisoners Suleman and Shakur in the legs upon which the mob scattered and ran.

Six of the accused were arrested in the village. Three of them, Rauf, Suleman and Jamuna, who had been armed with spears took refuge in the baitha-khana of Shafi and Ishaque whence they were

1928.

SHAFI KHAN
v.
KING-
EMPEROR.

COURTNEY
TERRELL,
C. J.

1928. extracted after the door had been broken open.
 SHAFI KHAN Three others Rajpati, Jangi and Sahid were arrested
 v. by the chaukidars and daffadars as they ran away.
 KING- The Sub-Inspector took the six prisoners to the canal
 EMPEROR. bridge and recorded a first information together with
 COURTNEY the statement of some of the witnesses, sent the
 TERRELL, corpse of the murdered constable to Buxar for post-
 C. J. mortem examination and sent messages to the
 Inspector and Superintendent of Police asking for an
 investigation. The other prisoners were arrested
 subsequently.

Upon the facts the accused raised one general defence which applies to all of them. It was contended on their behalf that the Sub-Inspector Sital Prasad is inspired by communal feelings against the Muhammadans, that he invented the story of the theft of the bullocks in collusion with Ram Birich Rai and that the story of the assault in the village is for the greater part concocted. I have only to say that there is not a particle of evidence to support this defence.

Then it is said that certain of the accused notably Sahid (no. 5), Rajpati (no. 6) and Jangi (no. 7) were arrester and subjected to ill-treatment before the fight in which the constable was killed. Rauf, Shafi and Suleman state that the Sub-Inspector forcibly entered Rauf's house which they would pass on their way to the open space in which it is alleged by the prosecution that the conflict took place. It is alleged that they desired to enter this house as well as that of Shafi not only to arrest him but to outrage the females of the establishment; that Rauf was beaten in his own house and arrested and that from Shafi's house a considerable sum of money was stolen. I have examined the evidence and I cannot see that there is any evidence to establish these points and moreover the Sub-Inspector was not cross-examined with a view to establish them. Each of the prisoners has clearly been identified as a member of the mob and there is no evidence to support the view that the

houses of Rauf and Shafi were entered. Moreover those of the accused who have chosen to make written statements tell contradictory stories. There is no necessity to analyse the evidence in detail. It is most adequately considered and dealt with by the Sessions Judge. Two of the assessors Babu Mahadeo Lal and Chaudhari Janki Singh were of opinion that there was a riot but did not think that there was any intention to kill the constable. Both were of opinion that all the accused save Sahid took part in the riot and that the riot took place in the manner described by the Sub-Inspector. One Assessor Dewan Daud Khan expressed the opinion that the whole case was doubtful and that the accused should get the benefit of the doubt. The meaning of this opinion is itself doubtful and it would have been interesting to know whether the assessor considered that the death of the constable was a matter of doubt. The fourth assessor Ramchabila Singh was of opinion that the accused Amir Ali and Shariar ought to be acquitted and that all the others were guilty on all the charges. In my opinion the learned Sessions Judge was right in coming to the conclusion that the common object of the mob was to kill the members of the party of police and there is one point in particular which indicates this object. It is established beyond all doubt that when the constable Maruf Khan had been killed the mob instead of breaking off the fight pressed hard upon the police with spears and lathis and even after the Sub-Inspector had fired two shots in the air they re-formed their forces and again attacked his party and had he not fired again and wounded some of the accused, he and his party would, in my opinion, certainly have lost their lives.

1926.

SHAFI KHAN
F.
KING-
EMPEROR.

COURTNEY
TERRELL,
C. J.

The last and most serious contention of the defence was urged upon us with great force by Mr. Hyder Imam on behalf of the two accused persons Shafi and Ishaque who have been sentenced to death. He contended that having convicted all the accused of murder the learned Sessions Judge selected these

1928.

SHAFI KHAN

v.

KING-
EMPEROR.

COURTNEY

TERRELL,

C. J.

individuals for sentence of death by means of a criterion which, he said, should not have been applied, namely, the characters they bore and their behaviour in circumstances not immediately connected with their participation in the actual murder of the constable. He contended that it is the practice where a large number of persons has participated in a murder and where it may be undesirable that a large number should undergo the death penalty that those selected for the death penalty are always those who are shewn to have taken an actual part in causing the death of the deceased. This argument was forcibly and impressively urged but, in my opinion, it is unsound. In deciding as to whether some or all of a number of persons are to be sentenced to death after a conviction for murder it has long been settled that *prima facie* all the persons convicted should be sentenced to the extreme penalty and it is only where special circumstances are shewn in favour of any individual that the Court sentences such individual to the alternative punishment of transportation for life. Now, in this case all the accused have in our opinion been rightly convicted of murder and the question therefore arises whether there are any special circumstances which should operate in favour of Shafi and Ishaque to excuse them from the extreme penalty. I am unable to find any such circumstances and indeed if any criticism is to be made of the judgment it is to be based upon the fact that the three accused Rauf, Suleman and Jamuna being armed with lethal weapons and taking a foremost place in the assault should have been sentenced to transportation for life instead of to the death penalty. I am unable to see any extenuating circumstances in their cases and, in my opinion, they should also have been sentenced to death. It is not the practice of the Court, however, save in extreme cases, to call upon the accused to shew cause why the sentences should not be enhanced and, in my opinion, it would not be wise to do so in this case. I have this moreover to add. If, as Mr. Hyder Imam has argued, the proper course had been to select individuals for the

death sentence rather than to eliminate from the death sentence those to whom special circumstances apply, and if, in such course of selection, the proper criterion was the participation of the accused in causing the death of the deceased constable, I would have said that the cases of Shafi and Ishaque were proper for such selection. There is ample evidence to show that they were leaders of their party in the assault. The evidence consists in the position which they had held in the village and in the circumstances surrounding the attempt to arrest Shafi and Ishaque at the well and in the undoubted fact that during the attack on the deceased constable they were in the forefront of the fight. Moreover Ishaque was armed with a spear. It is true that although the constable died from the combined effects of a lathi blow and a spear thrust either of which was separately fatal, it cannot be definitely proved which spear or which lathi actually inflicted the wounds. This fact, however, is of no importance because whatever was said as to the possible intentions of the rest of the party the intentions of Shafi, Ishaque, Rauf, Suleman and Jamuna in the forefront of the entire affray was to cause the death of the members of the police party.

As to the remainder of the accused having been rightly convicted and rightly sentenced nothing more need be said save that it may lie in the province of the executive Government to consider the cases of those members of the party whose age may possibly justify intervention. On this matter it is not for us to express any opinion but for my part I have not been able to find any special circumstances other than those of age in differentiation of the accused from the rest and this observation moreover does not apply to the case of Jamuna Nonia who was armed with a spear. In my opinion the sentences of death and transportation for life respectively should be confirmed and the appeal should be dismissed.

MACPHERSON, J.—I agree.

*Appeal dismissed.
Sentences confirmed.*

1928.

SHAFI KHAN

v.

KING-
EMPEROR.

COURTNEY

TERRELL,

C. J.