

have never been waived, (3) that the case of *Ram-sekhar Prasad Singh v. Mathura Lal*⁽¹⁾ is correctly decided, but the decision is of no assistance in deciding the present case and (4) that the observations, at page 129, in *Mukhdeo Singh v. Harakh Narayan Singh*⁽²⁾ are absolutely correct but the case of *Sri Ramchandra Nayek Kalia v. Gharbharan Ahir*⁽³⁾ has been incorrectly decided.

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For these reasons I agree that this appeal should be allowed and the suit of the plaintiffs dismissed with costs throughout.

S.A.K.

Appeal allowed.

APPELLATE CRIMINAL.

Before Varma and Rowland, JJ.

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Penal Code, 1860 (Act XLV of 1860), sections 33 and 302—murder—assault with the intention of causing death—body subsequently placed on railway line—death due to decapitation—accused, whether guilty of murder—test.

Where an accused person commits two (or more) acts, closely following upon and intimately connected with each other, they cannot be separated and assigned, the one to one

*Death Reference no. 3 of 1939, and Criminal Appeal no. 20 of 1939. Reference made by Sadhu Charan Mahauti, Esq., Sessions Judge of Manbhurn-Singhbhum, in his letter no. 143, dated the 25th January, 1939.

(1) (1925) J. L. R. 4 Pat. 320.

(2) (1931) I. L. R. 11 Pat. 112.

(3) (1930) 11 Pat. L. T. 886.

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intention and the other to another, but both must be ascribed to the original intention which prompted the commission of those acts and without which neither could have been done.

Where, therefore, the accused assaulted a woman with the intention of causing death, and thereafter placed her body on the railway line where she was run over by a train and the medical opinion favoured the view that the actual cause of death had been decapitation but there was no evidence that the accused, when he carried the body to the railway line, was under the belief that the woman was dead and that he was handling a dead body, *held*, that the accused was guilty of murder.

Kaliappa Goundan, In re(1), *Emperor v. Gajjan Singh*(2), *Emperor v. Khubi*(3), *Gour Gobindo Thakur, In re*(4) and *Queen-Empress v. Khandu Valad Bhavani*(5) (judgment of Parsons, J.), followed.

Emperor v. Dalu Sardar(6) and *Palani Goundan v. Emperor*(7), distinguished.

Reference under section 374 of the Code of Criminal Procedure, 1898.

The facts of the case material to this report are set out in the judgment of Rowland, J.

S. M. Gupta, for the appellant.

The Advocate-General, for the Crown.

ROWLAND, J.—This is a reference by the Sessions Judge of Manbhoom-Singhbhum under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death passed under section 302 of the Indian Penal Code on Nehal Mahto charged with the

(1) (1938) I. L. R. 57 Mad. 158.

(2) (1930) 32 Cr. L. J. 483.

(3) (1923) 25 Cr. L. J. 703.

(4) (1866) 6 W. R. 55 (Cr.).

(5) (1890) I. L. R. 15 Bom. 194.

(6) (1914) 18 Cal. W. N. 1279.

(7) (1919) I. L. R. 42 Mad. 547, F. B.

murder of Nisi Mahtain. The crime is said to have been committed on 16th August, 1938, after sunset while the deceased was returning from Balarampur *hat* to her own village Maldih in company with Duli Mahatain, P. W. 3. The deceased and the accused were in a way related, the deceased Nisi being the widow of Aklu whose mother Panu was the sister of the grandmother (Pelu) of Nehal and Gahan and of Gangi, mother of Rathu. Nehal, Gahan and Rathu were the accused persons in the case of whom Gahan and Rathu have been acquitted and Nehal convicted. The witness Duli is a sister of Rathu and another witness Giri is her son. I have mentioned Aklu, the husband of Nisi, and may state that P. W. 1, Badi, is father's brother of Aklu. Between the deceased Nisi and the accused persons there was indisputably ill feeling from some time past. Nisi had a claim to certain landed property by virtue of a deed of gift executed by Aklu's grandmother Sounri. The validity of this deed was disputed by the other side. There was a criminal proceeding which terminated in some sort of compromise. Subsequently Nisi pleaded that the compromise was not voluntarily agreed to by her with knowledge of its terms but was fraudulently induced and brought a pauper suit in 1937 claiming to recover the lands from which, she stated, she has been dispossessed. The suit was contested by Rathu, Uday and Ridu (Ridu being the father of Nehal, the appellant) and was fixed for hearing on the 15th September, 1938. The motive assigned for the crime is enmity against Nisi and for the purpose of stifling her litigation. She has left a daughter Fulmani, aged about 10 years, and it has been suggested for the accused that the motive is weak because the litigation could be continued on behalf of Fulmani even after the death of Nisi. But we have had in evidence that the suit in fact has collapsed and this result probably could be expected as a reasonable consequence of Nisi's death. In my opinion an adequate motive existed.

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The prosecution story regarding the event of the 16th August, 1938, is that Duli and Nisi had gone from Maldih to Balarampur *hat* to make purchases. After attending the *hat* they started to return home. On the way they were seen near a tank not far from Balarampur by P. W. 2, Mohammad Ali and P. W. 11, Jadu. Thereafter they continued their way and had reached the field of Lalu Mahto, Nisi walking in front and Duli following, when Nehal attacked Nisi with blows of a lathi on the neck and head. Nisi fell down. Duli who was approaching was threatened by Nehal who told her to run away and tell no one or else he would kill her and her son. Duli began to run away. Looking back she heard Nehal shouting to the other accused to join him. She saw the other accused and they began to drag Nisi away. Looking round she dropped and fell and broke her lantern which she had brought that day in Balarampur *hat*. She went home and she says became unconscious. Her son Giri returning that night found her unconscious. In the morning she told him what she had seen. That is the direct evidence as to the murder. The other part of the prosecution case relates to the recovery of what is said to be the dead body of Nisi. About 6-30 A.M. the Engine Driver of 57 Down Adra-Chakradharpur Passenger Train saw between the up line rails near the Urma Railway Station an object lying and being attacked by dogs. He reported this at Urma. The Station Master sent a man to guard the body which was the headless body of a female, the arms as well as the head having been severed from the trunk and the head being found lying at a short distance away at the foot of the embankment. Information was sent to the Government Railway police, Purulia, from which place a Sub-Inspector came at about 4 P.M. Meanwhile news of the gruesome discovery had reached the village Maldih where the absence of Nisi had already been noticed. In fact on the previous evening at about 7 or 8 P.M. the little daughter Fulmani was crying and was taken by the

witness Dhonu, the father of Ludhai, the chaukidar, to the house of P. W. 1 Badi, where the child spent the night. In the morning Badi went early to Bamhanjora and returned at about 9-30 A.M. not having found Nisi there. Bamhanjora is a village one *kos* from Maldihi and is the home of Mussammat Nisi's father. When he returned at what is called besham time, i.e., about 9-30 A.M. news reached the village that a woman was lying dead. On this he and Ludhai chaukidar went to the railway line and saw a body which they both claim to have been able to recognise as the body of Nisi. Post mortem examination was held on the remains which appeared to be the head and body of one person, the Civil Surgeon being of opinion that the injury might have been caused by being run over by a train and that it could be inferred from extravasation of blood in the tissues over the shoulder blades that the train might have run over the woman during her life. On this the case of the prosecution is that Nisi was seriously assaulted in the presence of Duli, that she was dragged or carried from that place to the railway line and placed on the line in an unconscious and helpless condition to be run over by the next train.

Mr. Gupta, who has argued the case with ability and thoroughness on behalf of the accused, has contended that there is not sufficient evidence to prove that Nisi has been murdered, that the body and head discovered are not proved to have been hers, their condition being such as to render certain identification impossible; secondly, that the direct evidence of Duli as to the assault on Nisi ought not to be accepted because of some discrepancies and improbabilities in her statements and because of the delay that elapsed before she disclosed to the world what she at the trial claims to have seen; and, finally, that if the prosecution has succeeded in establishing the facts that an assault was made by the accused as deposed to by Duli, that Nisi was carried away thereafter and left

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on the line where a train ran over her, the persons who left her on the line might have done this in the belief that she was already dead and that an act done to a dead body or to what is believed to be a dead body is not an offence against the person within Chapter XVI of the Indian Penal Code. Therefore, in his contention, the accused could not have committed murder of Nisi by placing her on the railway line and, on the other hand, they did not commit murder of her by the assault on the field because that assault itself did not cause death. These contentions I shall examine in order.

As regards the condition of the body the medical evidence shows that portions had been eaten by wild animals, the face bones were crushed into several fragments and greater parts of the soft parts were missing. The right side of the skull and the base was broken into several fragments, membranes were lacerated, brain was liquified and was coming out. The left side of the scalp, however, seems to have been present and on dissection clotted blood was found within it and between it and the skull about 4 inches in diameter around the parietal eminence. I shall have to refer to this injury later. It has been argued that on this description recognition could not be possible but the Civil Surgeon himself does not express a definite opinion as to this. The clerk in charge at Urma Railway Station, Babu Nritya Gopal Banerji, P. W. 10, who saw the body before it was removed from the railway line has, however, stated that there was nothing in the head by seeing which the person could be recognised by appearance. Of the two witnesses who claimed to identify it Ludhai is hardly cross-examined as to the possibility of identification and he speaks in chief of having seen the body and recognised it. He adds that he recognised the body by seeing the tatoo marks on the legs and the only question asked in cross-examination on this point elicited that there are tatoo marks on the legs and

arms of some other women of the village. The other witness Badi says he recognised the dead body to be that of Nisi and in cross-examination he says that he recognised it by the tatoo marks on the leg and by the face. He says further that although one of the cheeks had been eaten by wild animals the other portions of the head had not been damaged. The hair and scalp presumably was there and one gathers from the medical report that one cheek was present. It is perhaps not necessary to say, whether, if this evidence of identification stood absolutely alone, it would be considered sufficient. Actually it is to be considered along with and in light of other evidence in the case the decision of which turns on the question whether the evidence taken as a whole carries the conviction to a reasonable certainty as to the events which have happened.

Now I turn to the story told by Duli and the criticism on it that the disclosure of the facts of which she deposed has been unduly delayed. According to her son Giri she told him what she had seen at cock crow on the morning of the 17th August. It is stated by Duli and by the child Fulmani that Duli told Fulmani on the morning after the *hat* day that Nehal had killed her mother. But when Dhonu Harhi questioned Mussammat Duli at about besham time that morning she apparently told him that she had returned alone from the *hat* and had not seen Mussammat Nisi. Duli has explained her silence at first by saying that she was terrified of the consequences of giving out to the public what she had seen and there is some confirmation in the evidence of Giri, her son. He was out at work till the evening of the 16th about 8 P.M. When he came to the door of the house he found it shut and his mother did not respond on being called. The door was opened by his nephew, a small boy, and he found his mother unconscious. She did not respond when spoken to. Seeing her unconscious he rubbed oil on her body and did not disturb her further. It

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seems to me to be the truth that Duli was suffering from the effect of some violent shock and fright. Giri further deposed that he found a broken lantern chimney which his mother had brought home from the *hat* and this fits in with her explanation that she had bought the lantern but that its chimney was broken when she fell in running away at the time of the occurrence. We find that it had become known in the village that Duli and Nisi had been in company on the previous day. Badi informed Ludhai on Wednesday. Badi who went to the police station and lodged the first information at 4 P.M. mentioned that Nisi and Duli had gone to the *hat* together and mentioned his suspicion against the accused because of the motive. On the arrival of the Sub-Inspector in the village he examined Duli and Giri that same evening and Duli disclosed the substance of the facts known to her as already stated by me. The Sub-Inspector forthwith went to the alleged place of occurrence as indicated by Duli and there found paddy plants disturbed and marks of violence. It was dark and closer search could not be made at that time; but he went again to the place on the following morning and found at two points marks of blood. Scrapings were taken and one was found to be blood of which the origin could not be proved and the other was found to be human blood. The delay on the part of Duli in disclosing her knowledge of the occurrence can I think be explained by her fear of consequence to herself should she say anything against the accused before the arrival of some public authority who would be in a position to protect her. On the question of whether she was present when the assault on Nisi was made the fact that immediately on her statement the Sub-Inspector found marks of a struggle at the alleged place of occurrence is strong corroboration of her having been present and being a genuine witness. There is also the evidence of P. W. 2 Mohammad Ali, a witness who appears entirely disinterested and who saw Nisi and Duli together near

a tank on the way home from the *hat*. The alleged discrepancies in her evidence mostly consist of matters of detail which appeared in her later statement and are not present in the first disclosure. These are not in themselves proofs of fabrication and do not in my view discredit her testimony on the main point. If she was there, as she says, there is no reason why she should not have been able to correctly identify the principal assailant Nehal. The witness would appear to have favourably impressed the Sessions Judge and the assessors whose opinion was unanimous and agrees with the view at which I have arrived independently. I would accept Duli's testimony on this point.

Now we have to consider whether it is safe to put together the two parts of the prosecution case, namely, the disappearance of Nisi and the recovery of the body and to say that the facts point to the one conclusion that the missing woman is the body found. To some extent the two parts of the case are mutually corroborative. If the body belonged to some other person it is probable that evidence would be forthcoming of the disappearance of some such person. The coincidence in time between disappearance and the finding very strongly suggests that there is identity between the two. Along with this we have to see the motive which as already pointed out is fully adequate. In all the circumstances I feel no doubt that the identification which was made by the two witnesses and that not without reference to a definite mark of identification of tatooing should be accepted and I hold it established that Nisi was attacked, rendered unconscious and taken to the railway line. One more coincidence may be referred to before leaving this part of the case. Duli has stated in her evidence that the attack began with a lathi blow from behind on the back of the head and neck. The extravasation of blood in the parietal region of the scalp may well be the result of just such a blow.

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Now it remains to consider the point of law urged, namely, that the offence committed by the accused cannot be said to amount to murder. For this contention reliance is placed on the decisions in *Queen-Empress v. Kandur*(¹), *Emperor v. Dalu Sardar*(²) and *Palani Goundan v. Emperor*(³). In the first of these cases which was decided by a majority out of three Judges the facts were that the accused had struck the deceased on the head with a stick and rendered him unconscious and then believing that he was dead set fire to the hut in which he was lying with a view to remove all evidence of the crime. The blows struck were said to be insufficient to cause death and not the cause of death. Death was caused by injuries from burning; but the intention with which the accused set fire to the shed was not to cause death or to make the deceased's death certain but to do away with evidence. In the result it was held on the facts of that case that the offence committed by the accused was only an attempt to murder. In *Emperor v. Dalu Sardar*(²) it was held that the accused was not guilty of murder on a finding that he had first assaulted the deceased without any intention of causing death, and subsequently, believing her dead, had suspended her body by the neck by a piece of string tied to the roof of the house. It was found that in fact death was not caused by the previous assault but by the hanging. A conviction was had under section 325. These cases were considered by a Full Bench of the Madras High Court in *Palani Goundan v. Emperor*(³). In this case, as in the last case referred to, the finding was that the accused had assaulted his wife not intending to cause death, and subsequently, believing her dead, he suspended the body by a rope intending it to be believed that she had

(1) (1890) I. L. R. 15 Bom. 194.

(2) (1914) 18 Cal. W. N. 1279.

(3) (1919) I. L. R. 42 Mad. 547, F. B.

committed suicide. It may be noticed that in the Calcutta and Madras cases there was at the outset, as found, no intention to cause death. Herein these cases differ in the facts from the Bombay case. The correctness of the decisions in *Emperor v. Dalu Sardar*(²) and *Palani Goundan v. Emperor*(³) it is not necessary to question. I feel no doubt that unless the intention to cause death or a bodily injury sufficient to cause death has been present, the offence of murder is not committed. The majority in the Bombay case, however, have gone further than this and have held that even if the original assault was made with the intention of causing death, then if that assault did not cause death, the assailant is guilty in respect thereof of attempt to murder, and the subsequent disposal of what is believed to be a dead body was not considered to add anything to the crime. Parsons, J. dissented from this view and was of opinion that the acts so closely following upon and so intimately connected with each other could not be separated and assigned, the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. With great respect to the majority of the Judges who decided that case I am of opinion that the view taken by Parsons, J. is the correct view. It is curious that none of the Judges in dealing with either of the cases which I have cited has referred to section 33 of the Indian Penal Code which runs thus:—

“ The word ‘ act ’ denotes as well a series of acts as a single act : the word ‘ omission ’ denotes as well a series of omission as a single omission.”

In an earlier case of the Calcutta High Court, *Gour Gobindo Thakoor In re*(¹), where a Magistrate had recorded a conviction of causing hurt, commitment

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proceedings were ordered on the homicide charge in a case in which the deceased had first been assaulted and then hung up to a tree to make it appear that he had committed suicide. Norman, J. said—

“ It would be a very serious matter if an offender were to be allowed to escape because a too critical Court could not determine at what precise point in the course of a series of acts of violence, each capable of producing death, an unfortunate man expired under the hands of those who were ill-using him.”, while Seton-Karr, J. seems to have thought that it might be a question of fact whether the accused believed the victim to be dead before they hung him up. In the Allahabad High Court in *Emperor v. Khubi*(¹) the opinion was expressed that the view taken by Parsons, J. in the Bombay case was the correct one, and in *Emperor v. Gajjan Singh*(²) it was held that where the action was continuous and it was impossible to resolve the two incidents into two wholly separate actions, inspired by different motives and committed for different reasons, the accused must be treated as having done one act with the intention of causing death and as having succeeded in carrying out his object, and he was, therefore, guilty of murder. In this case the accused had struck his victim several times on the head so that he lost consciousness. Then, with the assistance of a boy Jagannath, he carried the victim a short distance and threw him, face downwards, into a pool. Gajjan then robbed the body and covered it with branches. Subsequently, Gajjan and the boy carried the body to the canal into which they threw it. In my opinion section 33 of the Indian Penal Code, though not referred to by the Judges, would fully have supported the treatment of the whole incident as one series of acts, and therefore within the meaning of the Code, as an act. These cases were considered in *Kaliappa Goundan, In re*(³) in which

(1) (1923) 25 Cr. L. J. 703.

(2) (1930) 32 Cr. L. J. 483.

(3) (1938) I. L. R. 57 Mad. 158.

the facts were strikingly analogous to those before us now. The two accused persons it seems had assaulted a woman, the wife of one of them, with the intention of causing death, and thereafter, intending to cause evidence of the offence to disappear, placed her body on the railway line with the intention of screening themselves from legal punishment. The Sessions Judge, following *Queen-Empress v. Khandu Valad Bharani*(¹) had recorded a conviction under section 307 of the Indian Penal Code and imposed a sentence of transportation for life. Medical evidence, as in the case before us, favoured the view that the actual cause of death had been decapitation. The cases in *Palani Goundan v. Emperor*(²) and *Emperor v. Dalu Sardar*(³) were distinguished on the ground that in those cases there had not been at the outset, or at any time, the definite intention of causing death. But where, as in the Bombay case, that intention is present it was held that Parsons, J. was right in regarding the incident as composed of two acts committed by the accused which together have caused death and must both be ascribed to the original intention. The result was that the accused were convicted of murder and dissent was definitely expressed from the view of the majority in the Bombay case. I am of opinion that the law is correctly stated in this decision. I wish to make it clear that we have not to deal with such a case as was before the Judges in *Palani Goundan v. Emperor*(²) or *Emperor v. Dalu Sardar*(³) where the original intention was not to cause death. So far as the evidence indicates, the intention of the accused was from the outset to cause death of the victim in pursuance of a preconceived plan. It is also to be noticed that there is no evidence whatever that the

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(1) (1890) I. L. R. 15 Bom. 194.

(2) (1919) I. L. R. 42 Mad. 547, F. B.

(3) (1914) 18 Cal. W. N. 1279.

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accused, when they carried Nisi to the railway line, were under the belief that she was dead and that they were handling a dead body. Mr. Gupta asked us to infer that they were under that impression from the fact that Duli, the eye-witness, said in her deposition that she saw Nisi lying dead and Nehal still assaulting her. But the inference which Duli looking from a distance and under circumstances of great agitation may have drawn does not give us reason to suppose that a similar belief was induced in the accused persons who were actually handling the person of the victim. They had full and complete means of observation. They could notice whether she was breathing, whether she had a pulse, and it is no part of the defence set up by the accused themselves that they removed her body under any misapprehension as to whether she was alive or not.

In my opinion the Sessions Judge and the four assessors have correctly held that the accused is guilty of murder, and for a crime of this nature it can hardly be suggested that the extreme penalty of the law is excessive. I would accept the reference, dismiss the appeal, and confirm the sentence of death.

VARMA, J.—I agree.

Reference accepted.

Appeal dismissed.