

So far as the accused nos. 2 to 5 are concerned, they can safely be convicted on their own confessions supported as they are by the discovery of the material objects.

So far as the accused no. 1 is concerned, the material against him is ample. There can be no doubt that the deceased was murdered on the night in question. She was seen alive in the evening. The condition of the dead body with lobes of ears cut off and the condition in which the house was found, leaves no room for doubt that robbery was committed along with murder. Then some properties of deceased which have been sufficiently identified were practically produced by the accused no. 1 and he must be taken to have been in possession of them. One may, therefore, safely presume under section 114 of the Evidence Act (the illustrations are not exhaustive) that the accused no. 1 was either involved in the murder and robbery or, at any rate, he received the stolen property knowing it to be the proceeds of the robbery. Having come so far, the little aid taken from the confessions proves the guilt of the accused no. 1 beyond any doubt.

J. K.

*Appeal dismissed.*

## APPELLATE CRIMINAL.

*Before Fazl Ali and Agarwala, JJ.*

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August, 31.  
September,  
1, 6.

*Penal Code, 1860 (Act XLV of 1860), sections 34 and 300—murder—accused killing paramour of a woman with whom he carried on intrigue—both found sleeping together—*

\*Death reference no. 24 of 1938, with Criminal Appeal no. 160 of 1938. Reference made by, and appeal against the decision of, T. Luby, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 28th July 1938.

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*grave provocation, whether can be pleaded—nature of provocation contemplated by first exception—direct evidence of acts of the accused sufficient to disclose his intention—question of motive, whether material—section 34, application of.*

The provocation which is mentioned in the first exception to section 300 of the Penal Code, 1860, is something which is recognized as provocation in law and not merely something which arouses the uncontrollable anger of a particular individual.

A man in love with a woman who has repulsed his suit might be so angry as to lose control of himself at the sight of her engaged in sexual intercourse with another, but if he kills one or both of them, he cannot plead grave provocation in mitigation of his offence. The law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of manslaughter and not of murder, has no application where the woman concerned is not the wife of the accused but a woman with whom the accused has been carrying on an intrigue sanctioned by the custom of the community.

*King v. Palmer*(1), and *Emperor v. Dinabandhu Ooriya*(2), relied on.

*Kota Potharaju, In re*(3), dissented from.

For the application of section 34 of the Penal Code, 1860, the question of motive is not material where there is direct evidence of the acts of the accused and the acts themselves are sufficient to disclose the intention of the actor.

*Satrughan Patar v. Emperor*(4) and *Maung Gyi v. King-Emperor*(5), 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 Agarwala, J.

*Ganesh Sharma*, for the appellant.

(1) (1913) 2 K. B. 29.

(2) (1929) 124 Ind. Cas. 818.

(3) (1931) 35 Law Weekly, 141.

(4) (1919) 50 Ind. Cas. 337.

(5) (1923) I. L. R. 1 Rang. 390.

*Assistant Government Advocate*, for the Crown.

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AGARWALA, J.—This is a reference under section 374 of the Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpur, for confirmation of the sentences of death passed on Murgi Munda (aged 25) and Gangu Munda (aged 24), both of village Kurunga, for the murder of Gansa Munda (aged 20) of village Keora, six miles from Kurunga.

On the occasion of the last Sarhul festival, i.e., on the 8th of April, 1938, there was a village dance held on a hill adjacent to village Behonda. In the evening this dance was continued at the Akhara of the village. As appears to be customary in that part of the country, it was attended only by the young people of the village, the elders being engaged in entertaining each other at their homes. Many of the young girls who were present at the dance at the Akhara have been examined as witnesses in this case, and from their evidence it appears that among the youngmen who were present were the two accused and the deceased Gansa Munda. At some time in the evening Gansa Munda left the Akhara, and after an interval of time not specified, two girls—Randai (p. w. 3) and Gangi (p. w. 4)—also left for the purpose of going to their respective homes to have their evening meal. On their way they met Gansa, who proposed to Randai that he should go to her home and smoke. She told him that there was no tobacco left, and eventually she and he went off together to the Jojhansa jungle. For what happened after that we have only the statement of Randai, supported by circumstantial-evidence.

Before dealing with this statement and the evidence it is desirable to make a few observations with regard to the parties concerned. The witnesses in this case are Mundas, and they have spoken with extreme candour about a custom which prevails in their community. It appears that it is customary for unmarried girls to cohabit with unmarried men, and

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that the only obligation this entails is that the man is expected to marry any girl who becomes pregnant by him. In village Behonda the scene of these meetings is Jojohansa jungle, which lies a few hundred yards outside the village. Gansa Munda, the deceased, was the brother of the daughter-in-law of Charan Munda (p. w. 1) the Munda of village Behonda. Previously he used to work for the Munda. While he was so employed, he carried on a love intrigue with Randai of the same village. Two years ago Gansa Munda left Behonda and took up his residence at village Keora. From that time Randai transferred her favours to Murgi Munda, the accused; but she has deposed that Gansa Munda was in the habit of visiting the village, and that whenever he did so she used to cohabit with him in the jungle.

I will now revert to Randai's account of what happened on the evening of the 8th of April when she and Gansa went to jungle. She said that by the side of a footpath under a Char tree, Gansa prepared a bed of leaves and twigs and that thereupon they had sexual intercourse. After that they fell asleep in each other's arms. Later in the night she awoke to find Murgi pulling her away from Gansa. He slapped her and kicked her. She noticed that the accused Gangu Munda was at this time engaged in pressing the neck of Gansa Munda with his hands. After pulling Randai away from Gansa, Murgi Munda then picked up a large stone and struck Gansa's head with it three or four times with the result that he died. The two assailants then took the girl some little distance away and under pain of death extracted from her an undertaking that she would disclose to no one what she had seen. The two men then tied Gansa's body with his own cloth to a branch of a tree, which was found lying nearby and carried him to the field of Balga which was partly under water. There they buried the body while the girl sat on the ridge of the field looking on. After this the two men washed their hands and feet in a water

channel and Gangu set off in the direction of Behonda and Murgi towards his house, with the girl. Murgi carried the pole for a part of the way but threw it away at Karipiri-tanr. According to the girl they reached Murgi's house at Kurunga after midnight. When they arrived there, they found that Samu Munda (p. w. 2) was also there. The girl stayed at Murgi Munda's house for the next three or four days, i.e., Saturday, Sunday, Monday and Tuesday morning. On the morning of Saturday Gangu arrived and had a talk with Murgi. While she was there she was warned twice by Murgi not to disclose what she had seen on Friday night. On Tuesday morning a police constable arrived at Murgi's house. Murgi was not there at the time as he was paying a visit to a Lohar. The constable took charge of Randai. Then they went and fetched Murgi and Gangu and after that all three persons were produced before the Sub-Inspector who was at Behonda, where the girl made a statement. The girl then took the Sub-Inspector to the Char tree where he noticed the bed of leaves and twigs and marks of struggle. Five yards from the tree he found blood on the ground and on leaves and stones. The girl pointed out the place in Balga's field where the body of Gansa had been buried, and also the branch to which the body had been tied and which had been discarded at Karipiri tanr. Although decomposition had set in, the girl and the villagers with the Sub-Inspector had no difficulty in identifying the corpse of Gansa Munda. The Sub-Inspector shewed a hair-pin which Randai said was hers.

This, as I have already said, is the only direct evidence we have of what transpired in the Jojohansa jungle on the night that Gansa Munda met his death, and the witness who has given this statement has told her story with a frankness and downrightness, which is extremely impressive even when read in print. The learned Judicial Commissioner who had the advantage of hearing the witness make the statement

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was equally impressed both by her story and by her manner of telling it. Even in the absence, therefore, of any corroboration of it, it would be extremely difficult to discard this statement, more particularly as there is absolutely no motive for her to implicate the two appellants falsely. She admits, and there is other evidence to the same effect, that both the appellant Murgi Munda and the deceased Gansa Munda were her lovers. Although on the night in question it was Gansa Munda whom she accompanied to the jungle, her regular lover (if one may use the term) was at that time—and had been for two years—Murgi Munda. There had been no quarrel or dissension between them. Nor is there any evidence that the appellant Gangu Munda had incurred either the anger or dislike of Randai, or of any other villagers so that there is no apparent motive for her to implicate him either.

Having thus given Randai's account of what happened to her and Gansa while they were in the jungle, it is necessary to refer to what went on in the village on the evening of the 8th of April and on the subsequent days, and for that purpose the most comprehensive evidence is that of the Munda of the village (p.w. 1). He says that on Saturday morning, when it was found that Gansa and Randai were missing, it was assumed that they had eloped. In the afternoon, however, the Munda's son Runka (p.w. 9), who had been in the Jojohansa jungle and had returned from there, told him that he had seen blood marks on a bed of leaves under a Char tree. The Munda thereupon sent his daughter-in-law, Hisi, to inquire whether Gansa was at Kudapiri where her sister lives. He sent his son Binrai and others to Keora to inquire whether Gansa was there. All of these people returned on Sunday morning without having found Gansa. The chaukidar was then sent for and shown the blood marks under the Char tree. They found there a broken necklace of seeds, which had belonged to Gansa, and they also

noticed a hair-pin which was subsequently picked up and given to the Sub-Inspector and shown by him to Randai, who said it was hers. The Munda then summoned the young men and women of the village and asked them what they had seen Gansa and Randai doing on Friday night, and he was informed by them that Gansa and Randai had left the Akhara separately and that afterwards the two appellants, Murgi and Gangu, had inquired where Randai had gone. This information, coupled with what had been found under the Char tree, led the Munda to conclude that either Gansa or Randai or both of them had been murdered. He, therefore, in the company of some of the villagers and the chaukidars set out for Tamar police-station, which is 30 miles from Behonda, taking with him the necklace and the hair-pin. They arrived at the thana on the morning of Monday, the 11th of April. The Assistant Sub-Inspector recorded the first information on the statement of Mangal chaukidar (p.w. 10). While this party was at the thana, another chaukidar, Soma Bhagta (p.w. 14) arrived there. He also had been shown the blood marks under the Char tree on Sunday and had discovered a trail of blood which began on the jungle path, not far from the Char tree, and led up to the field of Balga. He had noticed the water in the field was blood-stained, and had gone to the thana to report these facts. His statement was recorded in the form of a Sanaha, which is Exhibit 7 in the case. The Sub-Inspector, the chaukidars and villagers left for Behonda the same day and reached the village on Tuesday morning. While passing through the jungle the Sub-Inspector deputed a constable to fetch Murgi and Gangu from Kurunga. The constable is Sukhari Oraon (p.w. 17). He found Gangu at his home and Murgi at the house of a Lohar. Both these men and Randai accompanied him to the Sub-Inspector without protest. The Sub-Inspector took charge of the dhoties which the two men were wearing. These were sent to the

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Chemical Examiner who reported that both of them had blood-stains but as the stains were disintegrated he could not determine their origin. Stains of human blood were found on the dried leaves taken from the bed under the Char tree, on the mala, on the stone and on the earth which the Sub-Inspector scraped from the place of occurrence.

It will be observed that these facts amply corroborate the evidence of Randai in almost all material particulars. But as the appellant Gangu had no apparent motive to take part in this crime it is desirable to examine closely the evidence which implicates him. Of his relationship with Murgi Munda we know only that they come from the same village. The evidence of the girls of the village that he was with Murgi Munda on the evening of the 8th when Murgi Munda enquired from them at the Akhara as to the whereabouts of Randai is not challenged. There can be little doubt that two assailants were present at the commission of the crime. The stone with which Gansa Munda's head was battered has been produced in Court before us. It is a large piece of rock weighing  $10\frac{1}{2}$  seers or 21 lbs. A stone of this weight to be used effectively as an implement of assault would have to be firmly grasped with two hands. The assailant could not have wielded it with one hand while the other hand held the victim. Unless, therefore, Gansa Munda was killed without a struggle while he was asleep the inference is that some one held him while Murgi Munda struck him with the stone. This in effect is what Randai's description of the assault amounts to. Then the corpse could hardly have been moved by Murgi Munda alone from the Char tree to the field of Balga and buried there without any assistance. The branch to which Randai says the dead body was tied and carried is itself a heavy piece of wood. Medical examination disclosed that on Murgi Munda's right shoulder there was an abrasion which was about a week old at the time of the medical



examination, which was on the 14th April. This suggests that the branch on which the body was carried was slung on to the shoulders of the carriers and that it grazed the shoulder of Murgi Munda. The doctor also found on each of the shoulders of Gangu Munda marks of healed up ulcers but he was unable to determine their age or cause. The dhoties worn by both the accused, however, were blood-stained. The learned Judicial Commissioner asked each of the accused how he accounted for these stains. Neither of them offered any explanation. Although, therefore, the Chemical Examiner was not able to certify that the stains were those of human blood owing to disintegration there is no reason to suppose that they were stains of animal blood as, in that case, the accused themselves would have said so. It would indeed be a strange coincidence if the two persons suspected of this murder and who had been seen in each other's company shortly prior to the murder should have on their clothes stains of animal blood which neither of them was able to account for. I, therefore, agree with the learned Judicial Commissioner and the four assessors who assisted him in the trial that both the appellants were concerned in killing Gansa Munda. It has, however, been contended that the offence they committed was not murder. With regard to Murgi Munda it was argued that as he found his lover in the arms of Gansa Munda in the circumstances already narrated, the provocation for him to kill Gansa Munda was so grave as to affect the nature of the offence which he committed. Reliance was placed on the decision of a Division Bench of the Madras High Court in the case of *Kota Potharaju*(1). The facts of that case were that the accused, finding his mistress in the arms of a former lover, stabbed her. The Sessions Judge who tried the accused in that case convicted him of murder although he was of the opinion that had the deceased been the wife of the accused he would not

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(1) (1931) 35 Law Weekly, 141.

1938. have come to this decision. Their Lordships of the  
 MURGI Madras High Court observed: " We find it impos-  
 MUNDA sible to agree that the fact that Mahalakshmi was  
 v. the appellant's mistress and not his wife makes any  
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 EMPEROR. social morality to a purely psychological problem.  
 AGARWALA, The question is not whether the appellant ought to  
 J. have exercised, but whether he lost control over  
 himself. When a man sees a woman, be she his wife  
 or his mistress, in the arms of another man, he does  
 not stop to consider whether he has or has not the  
 right to insist on exclusive possession of her person...  
 .....She is a woman, of whose person he desires  
 to be in exclusive possession and that is, for the  
 moment, enough for him". With the greatest  
 respect to the opinion of these learned Judges  
 I disagree. The mere fact that a person's desires  
 are thwarted does not in law justify him killing the  
 person who is thwarting him. The provocation  
 which is mentioned in the 1st exception to section 300,  
 Penal Code, is something which is recognized as  
 provocation in law and not merely something which  
 arouses the uncontrollable anger of a particular  
 individual. A man in love with a woman who has  
 repulsed his suit might be so angry as to lose control  
 of himself at the sight of her engaged in sexual inter-  
 course with another but if he killed one or both of  
 them, he could certainly not plead grave provocation  
 in mitigation of his offence. In the case of a wife  
 the position is entirely different. The law recognizes  
 that a husband is entitled to expect fidelity from her.  
 It is even possible that the provocation might be held  
 to be grave in the case of a man who finds in the arms  
 of another lover a mistress whom he maintains and  
 from whom, therefore, he might reasonably expect  
 faithfulness. But that this is not so even in the case  
 of a girl betrothed to the assailant is clearly indicated  
 in the case of *King v. Palmer*(1). In that case the  
 girl to whom the accused was betrothed suddenly  
 informed him that she had been prostituting herself.

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(1) (1913) 2 K. B. 29.

He thereupon seized her and cut her throat with a razor which he had in his pocket. Lord Coleridge, J. who tried the case directed the jury that "no provocation by words, however opprobrious, in a case where a deadly weapon is used, can in law reduce the crime from murder to man-slaughter". This direction was challenged in the Court of Criminal Appeal by the accused. In delivering the judgment of the Court Channell, J. observed: "The Judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to man-slaughter. It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But the only special circumstances which have been held sufficient for that purpose are where the words involved a confession of adultery.....The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married. Under those circumstances, if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of man-slaughter, we think that it was right". It may be observed in the present case that Murgi Munda was not even betrothed to Randai. Between them existed an intrigue sanctioned by the custom of the community in which they lived but in no way entailing the obligation of marriage unless and until Randai should have become pregnant by Murgi. It may be noticed that the observation in the Madras case referred to above were mere obiter for the Court declined to interfere with the conviction for murder on the ground that before stabbing his wife the accused deliberately fastened the door of the room and searched for the knife with which he then stabbed her. In *Emperor v. Dinabandhu Ooriya*(<sup>1</sup>) a

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Division Bench of the Calcutta High Court held that the well-established law that when a husband discovers his wife in the act of adultery and thereupon kills her, he is guilty of man-slaughter only and not of murder, has no application where the woman concerned is not the wife of the accused but only a public woman. In my opinion the offence committed by Murgi Munda was murder.

With regard to Gangu Munda it was contended that even if Murgi intentionally murdered Gansa that intention was not shared by Gangu. It is true that Gangu had not even that amount of motive which actuated Murgi; but in a case where there is direct evidence of the acts of the accused the question of motive is not material if the acts themselves are sufficient to disclose the intention of the actor. Reference was made to the case of *Satrughan Patar v. Emperor*(1) where a Division Bench of this Court pointed out that "The mere fact that a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under section 34 of the Penal Code....." Their Lordships observed, "It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that section 34 may be applied." It was contended on behalf of the appellant Gangu that there was no evidence of a preconceived or premeditated plan between him and Murgi for the murder of Gansa. But on the other hand it cannot be denied on the evidence that has been accepted that he acted in concert with Murgi in bringing about the result which followed. The learned Advocate for the appellants also cited the case of *Maung Gyi v. King Emperor*(2) where it is observed, "The existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and

(1) (1919) 50 Ind. Cas. 337.

(2) (1923) I. L. R. 1 Rang. 390.

it must also be proved that the common act for which the accused is to be made responsible was acted in furtherance of that common intention". The post mortem examination of the corpse in the present case revealed that the left temporal bone was broken in three pieces, the right temporal bone in two pieces, and the parietal bone in six pieces, indicating that more than one blow was struck and, as I have already shewn, the evidence discloses that these blows were struck either while Gansa was asleep or else while he was deprived of the power of defending himself. The Sub-Inspector found marks of struggle near the Char tree and the blood-stains which he noticed were five yards from the tree. The blood-stained stones were also found at this place. This clearly indicates that Gansa was not killed in his sleep while lying under the Char tree. If, therefore, he was awake he would have been in a position to put up some kind of defence against a person who had both his hands engaged in grasping a heavy stone unless his actions were impeded by some other person. The evidence, in my opinion, clearly indicates that his actions were so impeded by Gangu. From these circumstances the only inference is that at the time when Murgi battered the head of Gansa with the stone, the intention of killing him was shared by Gangu. In my opinion, therefore, the offence committed by Gangu is also murder. The circumstances in which the crime was committed do not justify any mitigation of the sentence passed on Murgi Munda and this is confirmed; but with respect to Gangu the absence of motive for him to take part in committing the offence suggests that he was acting under the influence of his companion. I would, therefore, alter the sentence of death passed on him to transportation for life.

FAZL ALI, J.—I entirely agree.

*Conviction upheld.*

*Sentence on appellant*

*No. 2 altered.*

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