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to pay the compensation twice over to different persons, and a question of that sort appears to me to be one which can only be decided satisfactorily in a separate suit.

In the present case it does not seem to me that the appellant even contemplated the making of any order against the Collector by the District Judge, nor so far as this question of the apportionment of the compensation was concerned can the Collector be deemed to have been a party.

For these reasons I am of opinion that this appeal must fail, and I would dismiss it and direct that the first respondent should obtain his costs in this appeal.

DAS, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Das and Mr. Justice Brown.

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March 22.

NGA PO KYONE *v.* KING-EMPEROR.*

Common intention—Penal Code (XLV of 1860), ss. 34, 114—Distinction between s. 34 and s. 114—Abetment—Operation of s. 114—Criminal Procedure Code (Act V of 1898), ss. 236, 237.

The appellant was charged under s. 302 read with s. 34 of the Indian Penal Code with the murder of a woman. The evidence showed that the appellant with a number of other persons, armed with *dahs* and spears, attacked her house. The appellant incited the others to set fire to the building, which they did. The appellant then in the presence of the woman incited the others to cut her, and two of them stabbed her to death. The defence was that the facts proved did not constitute an offence under s. 302 read with s. 34 of the Code, and that the Court could not consider whether they constituted an offence under s. 302 read with s. 114 as the charge was not under the latter section.

Held (1) that the provisions of ss. 236 and 237 of the Criminal Procedure Code apply both in cases where the law applicable is doubtful, and in cases where the facts are doubtful ;

* Criminal Appeal No. 230 of 1933 from the order of the Sessions Judge of Tharrawaddy in Trial No. 4 of 1933.

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Begu v. *The King-Emperor*, I.L.R. 6 Lah. 226—*referred to.*

(2) that the distinction between the effect of s. 114 and s. 34 of the Indian Penal Code was a very fine one ; (3) that s. 114 came into operation only when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition ; that as there was no proof of any abetment before the commission of the offence in this case the section did not apply ; (4) that in the circumstances of the case the appellant had the common intention with the actual murderers to cause the death of the woman, and was rightly convicted of murder.

Barendra Kumar Ghosh v. *Emperor*, I.L.R. 52 Cal. 197—*followed.*

So Nyun for the appellant.

Tun Byu (Assistant Government Advocate) for the Crown.

BROWN, J.—The appellant, Po Kyone, has been found guilty of murder and sentenced to death. He has also been found guilty under s. 436 of the Indian Penal Code, but no sentence has been passed under that section.

The main facts of the case are reasonably clear. In June 1931, a Process Server came to Leaindan village in the Tharrawaddy District to serve a summons on behalf of the deceased, Ma Shwe Sein, in certain civil litigation. This was apparently resented by the person on whom the summons was to be served, or his relations, and the Process Server was assaulted. A body of men, of whom the appellant was one, then made a demonstration in front of Ma Shwe Sein's house. They went away on this occasion without resorting to actual violence ; but not long afterwards nine of them, including the appellant, came again armed with *dahs* and spears. They threw stones and sticks at the house and set fire to the cattle shed adjoining. Some of the inmates of the house escaped, but when Ma Shwe Sein came out of the house the appellant shouted " Cut, cut " and two of the party,

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Po Sai and E Maung, cut Shwe Sein with their *dahs*, killing her on the spot. She had a number of wounds. One was a wound $7\frac{1}{2}''$ by $1''$, extending from the middle of the forehead to the back of the neck on the right side of the head, fracturing the right frontal and temporal bones. There were three other wounds on vital parts almost as serious. There can be no question but that the assailants intended to cause her death.

A number of the alleged assailants have already been tried and convicted ; but after the occurrence the appellant, Po Kyone, was not to be found, and he was only arrested on the 29th of December, 1932, that is some 18 months after the occurrence. There can be no question whatsoever but that Ma Shwe Sein was brutally murdered. The appellant does not deny that he was present, but he says that he went there to restrain one of the principal assailants, Po Sai. There is, however, ample evidence for the prosecution to show that the appellant took an active part in the assault.

[His Lordship set out the evidence and continued.]

The appellant has called no evidence, and I consider it clearly established that he was in the party of nine men ; that he instigated both the setting fire to the building and the murder of Ma Shwe Sein ; and that he was close by when Ma Shwe Sein was actually murdered.

The appellant was charged under the provisions of s. 302 read with s. 34 of the Indian Penal Code. It is contended that the facts proved do not constitute an offence under s. 302 read with s. 34 of the Indian Penal Code, and that we cannot consider whether they constitute an offence under s. 302 read with s. 114 of the Indian Penal

Code, because the charge did not mention the provisions of s. 114 of the Indian Penal Code. I do not think there is any substance in this contention. It has often been said that the provisions of ss. 236 and 237 of the Code of Criminal Procedure only apply in cases where the law applicable is doubtful and do not apply in cases where the facts are doubtful. I must confess that I have found it difficult to understand how this distinction can be drawn.

S. 236 of the Code of Criminal Procedure says :

" If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once ; or he may be charged in the alternative with having committed some one of the said offences."

And s. 237 lays down :

" If, in the case mentioned in s. 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it."

These sections do not say that they are applicable only when the facts are clear but the law is doubtful. Two illustrations are given under s. 236 and in each of those illustrations the facts are clearly doubtful. The facts necessary for the offence of theft are entirely different from the facts necessary for the offence of receiving stolen property. As regards the second illustration, it is quite clear that what is doubtful is not the law applicable but the facts, that is to say, whether the statement in the Sessions Court was true, or the statement before the Magistrate was true. This restricted

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interpretation of ss. 236 and 237 of the Code of Criminal Procedure does not seem to be the interpretation put on those sections by their Lordships of the Privy Council. In the case of *Begu and others* v. *The King-Emperor* (1), their Lordships after setting out the provisions of ss. 236 and 237 of the Code of Criminal Procedure remarked :

" The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

In that case the charge was under s. 302 of the Indian Penal Code, and their Lordships decided that a conviction could legally be passed under s. 201 of the Indian Penal Code. Even taking the narrower view of the section, I do not think there can be any real difficulty in the present case. The real doubt in the present case is not as to the facts but as to the law applicable to the case. The distinction between the effect of s. 114 and s. 34 of the Indian Penal Code is a very fine one. In the course of their judgment in the case of *Barendra Kumar Ghosh* v. *Emperor* (2), their Lordships remarked :

" As to s. 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition. [*Abhi Misser* v. *Lachmi Narian*, (3).] Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. S. 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the

(1) (1925) I.L.R. 6 Lah. 226. (2) (1924) I.L.R. 52 Cal. 197, at pp. 212, 213.
(3) (1900) I.L.R. 27 Cal. 566.

crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by s. 144 brings the case within the ambit of s. 34."

In the same case their Lordships dealt at considerable length with the meaning of the provisions of s. 34. In that case three men had attacked a Post Master and fired pistols at him as a result of which he died. It was held by their Lordships that the offence of murder against the appellant was complete, even though he might not have fired the fatal shot, if he joined in the attack and had the intention with the other assailants of committing murder.

It seems to me, therefore, that in a case like the present, where there is no proof of any abetment before the commission of the offence, the provisions of s. 114 are not really applicable. The evidence is to the effect that the appellant with a number of other persons, armed with *dahs* and spears, attacked the house; that the appellant incited the others to set fire to the building; that the others acted on this incitement; that the appellant then in the presence of Ma Shwe Sein incited the others to cut her; and that they cut her to death. If it be held that the appellant had the common intention with the actual assailants to cause death, it must be held that he took an actual part in the assault; and that under the provisions of s. 34 of the Indian Penal Code he is as much guilty of murder as the actual persons who delivered the blow.

What we have to consider in this case, in my opinion, is whether in the circumstances it can be held that the appellant had the common intention with Po Sai and E Maung to cause the death of Ma Shwe Sein.

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I find it difficult in the circumstances to hold that he had any other intention. It is concluded that Po Kyone was not himself in any way interested in the attack on Ma Shwe Sein or in any way aggrieved by the steps taken in litigation by Ma Shwe Sein, and it is suggested that E Maung who was closely related to Ma Shwe Sein's opponents in the litigation went further than Po Kyone ever intended in causing Ma Shwe Sein's death. The facts proved however are that nine men armed with *dahs* and spears attacked the house; that the cattle shed and the house itself were set fire to at the instigation of Po Kyone who was one of the party of nine; that when Ma Shwe Sein came out of the house Po Kyone instigated the others to cut her; that two others of the party of nine Po Sai and E Maung then cut her; that Po Kyone was close by at the time of the cutting, and that after the cutting he disappeared and was not found for eighteen months. A man must ordinarily be held to have intended to cause the natural and probable consequences of his actions. The natural and probable consequences of the attack with *dahs* on an unarmed woman in such circumstances was her death. There is nothing whatsoever to indicate that Po Kyone did not mean to go so far as his companions did under his instigation. The attack on Ma Shwe Sein must in my opinion be held to have been a joint attack by Po Kyone, Po Sai and E Maung in which the three men had the common intention of killing her. I am of opinion that Po Kyone was rightly convicted of murder, and that in the circumstances the death sentence was justified.

I would dismiss this appeal and confirm the sentence of death which has been passed on Po Kyone.

DAS, J.—I agree.