CRIMINAL REFERENCE.

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu and Mr. Justice Bagnley.

1935

Jan. 7.

KING-EMPEROR

v.

NGA AUNG THEIN AND ANOTHER.*

Common intention—Criminal act—Common intention a question of fact in each case—Fatal stroke by one of the party—Liability of the rest—Presumption of law or fact—Inference from evidence—Robbery with murder—Use of fire-arms—Common intention to murder—Penal Code (Act XLV of 1860), s. 34.

Whether or not a criminal act is done by several persons in furtherance of the common intention of all within s. 34 of the Indian Penal Code is a question of fact to be determined on a consideration of the facts in each case ; and the common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned. In combinations of this kind a mortal stroke, though given by one of the party is deemed in the eye of the law to have been given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike.

Barendra Kumar Ghosh v. *Emperor*, I.L.R. 52 Cal. 197 ; *Emperor* v. *B. K. Ghosh*, 38 C.L.J. 411 ; *Emperor* v. *Irshad Ullah Khan*, I.L.R. 55 All. 607 ; *Emperor* v. *Ranchhod*, I.L.R. 49 Bom. 84 ; *Nga E* v. *King-Emperor*, I.L.R. 8 Ran. 603 ; *Nga Po Kyone* v. *King-Emperor*, I.L.R. 11 Ran. 359—*followed.*

There is no *presumptio facti* or *juris* in such cases ; the question of fact depends not upon a legal presumption, but upon the inference that the Court draws from the evidence adduced at the trial.

King-Emperor v. *Nga Nyan Gyai*, Cr. Ap. No. 91 of 1926, H. C. Ran. ; *San-laydo* v. *King-Emperor*, Cr. Ap. No. 355 of 1933, H.C. Ran.—*considered.*

The ascription of a common intention to add murder, if necessary to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise are found to have carried firearms and firearms have been used with fatal effect.

Emperor v. *Barendra Kumar Ghosh*, 38 C.L.J. 411—*referred to.*

A. Eggar (Government Advocate) for the Crown. Sections 34 to 38 of the Indian Penal Code describe the circumstances in which a joint act, or a composite act, or an act in which several persons are engaged or concerned, is to be deemed the act of each of them.

* Criminal Reference No. 120 of 1934 arising out of Criminal Appeals Nos. 1271 and 1272 of 1934 of this Court.

Where a crime results from the acts of several persons, each of them is guilty of the crime if it was done in furtherance of their common intention. (S. 34 read with the section describing the crime.)

Where persons are jointly charged with a crime in which they were all concerned but it is found that the intention of one (or more) of them did not amount to the common intention alleged, then he (or they) may be convicted of the crime constituted by the composite or joint act coupled with his own intention. S. 38.

If his intention was different from that of the others, but from a different angle was equally criminal in connection with the joint act, then he may be convicted of the same offence. S. 35.

What was a person's intention is a question of fact to be determined by the circumstances and the reasonable inferences to be drawn therefrom. The fact that a number of persons set out together to give a person a beating each with the knowledge that one or other of them was armed with a deadly weapon, may be sufficient to justify the inference that they had the common intention to do what such a weapon would accomplish. If they are merely found beating the victim their intention may be inferred from the parts they played and the weapons they used, but they need not necessarily be presumed to have had the common intention of going to the extreme limit.

Emperor v. *Barendra Kumar Ghosh* (1); *Nga E and one* v. *King-Emperor* (2); *Emperor* v. *Irshad Ullah Khan* (3); *Nga Po Kyone* v. *King-Emperor* (4).

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(1) I.L.R. 52 Cal. 197.
(2) I.L.R. 8 Ran. 603.
(3) I.L.R. 55 All. 607.
(4) I.L.R. 11 Ran. 354.

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PAGE, C.J.—In this case the question propounded is :

"When less than five people go out armed to commit robbery without any prearranged intention to commit murder, but in the course of the robbery one of the robbers does commit murder, are all the robbers liable to be convicted under section 302, read with section 34, of the Indian Penal Code, when there is no evidence to show that they committed any further act which would render them directly liable as abettors?"

For the purpose of disposing of this reference it is sufficient to take the following facts as set out in the order of reference: "Four men (E Maung, Hla Maung and the appellants Aung Thein and Chit Shein) went out and attacked a bazaar woman, Ma Paw Gyi, who was travelling with her wares in a cart driven by San Myint and accompanied by a small girl, aged eleven, called Ma Nyein. Ma Paw Gyi was called upon to stop, and she got down out of the cart. One of the robbers cut her, and San Myint jumped down out of the cart and bolted pursued by E Maung armed with a *dah* without success. He then returned and cut Ma Paw Gyi several times with the *dah*, after which Hla Maung thrust his spear through her body. Aung Thein and Chit Shein merely took passive parts in the whole affair, and were armed with nothing more than sticks." Ma Paw Gyi died as the result of the injuries that she received. E Maung and Hla Maung were convicted under sections 392-397 of the Indian Penal Code, and sentenced to suffer transportation for life. Aung Thein and Chit Shein were convicted under section 394 and sentenced to transportation for life.

All four of the accused were convicted of murder, E Maung and Hla Maung under section 302, and

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Aung Thein and Chit Shein under section 302/34 ; E Maung and Hla Maung being sentenced to death, and the appellants Aung Thein and Chit Shein to transportation for life.

Under section 34 of the Indian Penal Code it is provided that

"when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

It is not necessary, and I decline, to burden my judgment in this case with a discussion of the meaning and effect of section 34, which has been explained in a number of cases, and which, in my opinion, is perfectly clear. [*Emperor* v. *Barendra Kumar Ghosh* (1) ; *Barendra Kumar Ghosh* v. *Emperor* (2) ; *Nga E and another* v. *King-Emperor* (3) ; *Nga Po Kyone* v. *King-Emperor* (4) ; *Emperor* v. *Ramchhod Sursang and others* (5) ; *Emperor* v. *Irshad Ullah Khan and others* (6).]

Whether or not "a criminal act is done by several persons in furtherance of the common intention of all," is a question of fact to be determined on a consideration of the facts in each case, and the common intention may be inferred from the circumstances disclosed in the evidence, and need not be the subject of an express agreement between the persons concerned. The words "without any pre-arranged intention to commit murder" in the question that has been referred are ambiguous, but it is enough to say with respect to these words that if the persons by whom the criminal act was done had expressly agreed beforehand that they would

(1) 38 Cal. L.J. 411.
(2) (1924) I.L.R. 52 Cal. 197.
(3) (1930) I.L.R. 8 Ran. 605.
(4) (1933) I.L.R. 11 Ran. 354.
(5) (1924) I.L.R. 49 Bom. 84.
(6) (1933) I.L.R. 55 All. 607.

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endeavour to commit the offence, that, no doubt, would be cogent evidence that the act, if committed, was done in furtherance of the common intention of the conspirators. But the question is one of fact that turns upon the circumstances disclosed in the evidence in the particular case under consideration. The legal position of the persons concerned in the commission of an offence such as the one alleged in the present case has never been put more clearly than it was by Sir Michael Foster, as long ago as 1809.

"In combinations of this kind the mortal stroke, though given by one of the party is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike"

[Foster's Crown Law (Ed. 1809) p. 351]. In precise language Richardson J. in *Barendra Kumar Ghosh*'s case (1) explained the position in the same sense :

"Prove the common intention of the persons present at the commission of the offence and all would be equally guilty of nothing less than that offence. If death were the result of the act or series of acts of one out of several confederates, the act would be done by them all within the meaning of section 34. If death followed the different acts of different confederates at the same time and place, then again section 34 would probably suffice. Every confederate would be regarded as having done every criminal act, and would therefore be liable as if he had done them all alone."

In *King-Emperor* v. *Nga Nyan Gyai* (2) Maung Ba and Otter JJ. held that

"though it is not possible to say which of the robbers caused this fatal injury, in our opinion every one of them should be held liable under section 34, Indian Penal Code. When

(1) 38 Cal. L.J. 411. (2) Cr. Ap. No. 91 of 1926, H.C. Rgn.

three persons went out armed to commit robbery, it must be presumed that they knew that such a result was likely to occur, and that the fatal blow was dealt in furtherance of their common intention."

With all due deference, in my opinion, no *presumptio facti* or *juris* arises in such circumstances, the question of fact depending not upon a legal presumption, but upon the inference that the Court draws from the evidence adduced at the trial. In *King-Emperor* v. *Nga Nyan Gyai* (1) and in *Sanlaydo* v. *King-Emperor* (2) the Court found on the facts, in the first case that the common intention had been proved, *secus* in the second case. In *Sanlaydo*'s case I am not satisfied, as at present advised, that I should have come to the same conclusion as Cunliffe and Dunkley JJ. arrived at in that case, but it is unnecessary to discuss that matter, for each case turned on its own facts, and no question of law arose in either case.

In the present case the Appellate Bench will determine the appeal in accordance with law and the facts disclosed in the evidence, and it is not for this Court in considering the question that has been referred to enter upon a discussion of the merits of the case, or to indicate in any way what is the conclusion at which the Appellate Bench ought to arrive.

The following observations of Richardson J. in *Barendra Kumar Ghosh*'s case (3)—with which I respectfully agree—, however, appear to me to be not inapposite in connection with such a question as that which arises in the present case :

"A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance, or evading

(1) Cr. Ap. No. 91 of 1926, H.C. Ran. (2) Cr. Ap. No. 355 of 1933, H.C. Ran.
(3) 38 Cal. L.J. 411.

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capture by taking life, is sufficient . . . Without mincing matters the ascription of a common intention to add murder, if necessary, to robbery, is not easily avoided, where all, or some to the knowledge of the rest, of those engaged in the enterprise, are proved to have carried firearms and firearms have been used with fatal effect."

I would answer the question propounded in the above sense.

MYA BU, J.—I concur.

BAGULEY, J.—As one of the Judges who made this reference I would like to add a few words.

Our object in making the reference was to get an authoritative ruling for the benefit of Sessions Judges trying cases like the one under examination, for, before some, the ruling in *Sanlaydo*'s case was being quoted from the All-India Reporter, and it was clear that some copies of the judgment in *Nga Nyan Gyai*'s case had got into circulation. As both these judgments contain what appear to be uncompromising dicta on the question of presumptions that ought, or ought not to be drawn, an authoritative ruling, binding on all Courts in this Province seemed eminently desirable.

The answer to the question as drafted, as I now recognise, is that no direct and unqualified answer can be given. There is no presumption that can be, and has got to be, made. Each case has got to be judged on the facts proved and the inferences that the Court draws from those facts, remembering always that if sufficient facts have not been proved to warrant a deduction unfavourable to the accused the benefit of the absence of any such deduction must be given to the accused.

The leading case on the point is without doubt the Privy Council ruling of *Barendra Kumar Ghosh* v.

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Emperor (1). The crux of that decision is the finding that the passage in the charge to the jury

"if you come to the conclusion that these three or four persons came into the post office with that intention of robbery and, if necessary, to kill, and death resulted from their act, if that be so, you are bound to find a verdict of guilty"

was correct.

This being the case it seems that the condition precedent suggested in the question, namely a prearranged intention to commit murder, a prearrangement which from the nature of things in the vast majority of cases it would be absolutely impossible to prove, is not essential for the finding of guilty of murder under section 302, Indian Penal Code, read with section 34, Indian Penal Code, against all the robbers. For a finding of guilty under these two sections read together it is sufficient if the Court is of opinion that from all the facts proved, the way in which the robbery is carried out, the weapons with which the robbers were armed, and their knowledge of the way in which their fellow robbers were armed, the characters of the robbers themselves, and so on, a legitimate inference can be drawn that the robbers went out "to commit robbery and, if necessary, to kill," and that death resulted in consequence of what they, as a band, did.

As an example I may mention what happened some years ago in the Mergui District. A band of marauders came over from Siam, and committed a large number of dacoities, many of them accompanied by murder. Sometimes the whole band, or five or more of them, took a hand in an individual raid,

(1) (1924) I.L.R. 52 Cal. 197.

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in which case all were liable to the death sentence under the Indian Penal Code, s. 396; whereas in other raids it was not proved that more than four took a hand. In any of these lesser raids in which anyone happened to be murdered, according to the standard laid down in *Barendra Kumar Ghosh*'s case all those present would have been liable to the death sentence under sections 302 and 34. On the other hand every experienced Sessions Judge must have come across cases of robberies carried out by very craven folk, men little better than ordinary sneak thieves, who carry *dahs* because it is the conventional thing to do and merely for the purpose of overawing villagers whom they confidently expect to offer no resistance, and who really do not envisage the possibility of resistance being offered. If in such a case resistance is offered and one of the band, possibly mainly through terror, strikes out and kills someone, the remaining members of the band would then not be liable to be found guilty under the two sections named.

This being the view that I take of the matter now before us for consideration I am of opinion that the general dictum laid down in *Nga Nyan Gyai*'s case goes too far, though the actual decision in that case was correct owing to the fact that in that case three armed robbers were seen chasing one of the victims of the robbery, despite the fact that the victim when subsequently picked up dead was found to have only one fatal injury on his person. On the other hand I do not think that the rule laid down in *Sanlaydo*'s case goes far enough. The passage quoted requires an addition at the end somewhat on these lines ". . . Knowledge is not the same thing as intention. Nevertheless if a man knows that a certain course of action in which

he is taking part will under certain circumstances most probably result in death being caused, and still, with that knowledge, persists in his course of action, and death is caused owing to the eventuality which he has foreseen taking place, it may give rise to a legitimate deduction that he intended the causing of death if that eventuality did occur, and he would then be liable as though he had caused that death himself."

My answer to the question propounded would therefore be as follows:

"Under the circumstances mentioned in the question, if from the evidence as a whole, and all the surrounding circumstances of the case, the Court is of opinion that a legitimate deduction may be made that at the time the robbery occurred the band of robbers, or any of them, had formed the intention of committing robbery, and, if necessary, of killing in order to carry out the robbery successfully, each and all of the robbers who had formed that common intention are liable to be convicted under section 302 of the Indian Penal Code, read with section 34 of the same Code."

I therefore agree with my Lord the Chief Justice.