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BAL KRISHNA v. THE CROWN.

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(or any other magistrate having jurisdiction to try the case before whom the case may be put up) to pass fresh orders in this matter after considering the evidence available.

N. F. E.

Petition accepted in part.

APPELLATE CRIMINAL.

Before Bhide and Tapp JJ.

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Dec. 10.

SULTAN AND OTHERS—Appellants

versus

THE CROWN—Respondent.

Criminal Appeal No. 711 of 1930.

Indian Penal Code, 1860, sections 34, 38, 302—Murder—committed, by one of several accused—No common intention to injure deceased—Each accused liable for his own act only.

The parents of the deceased girl having refused consummation of her marriage to the appellant *S.*, he and two others armed themselves with *lathis* and proceeded to demand the girl. On being refused, *S.* struck her a single *lathi* blow which killed her; the other two appellants at the time inflicting minor injuries upon the girl's relatives; the common intention being merely to carry away the girl.

Held, that if the murder of the girl had been prompted by a common intention, then on the application of section 34 of the Penal Code there could have been only one offence for the commission of which each of the participators was equally liable.

Barendra Kumar Ghosh v. *Emperor* (1), followed.

But, as there was no common intention to cause hurt to the deceased and the fatal blow dealt by the appellant *S.* was an unpremeditated act springing from his mind alone, the other two appellants were not constructive participators in that act, even though they may have struck one or more blows. It was not logical, therefore, to hold that, while they did not participate in the act of murder owing to the

(1) (1925) I. L. R. 52 Cal. 197, 211 (P. C.).

absence of common intention, they were still liable for a lesser offence *arising out of that act.* As the guilt of the appellant *S.* had been separately determined, that of the other two appellants had to be similarly determined in respect of acts proved to have been committed by them, and not in connection with or relating to the act of *S.*

Appeal from the order of Khan Bahadur Sheikh *Din Mohammad, Sessions Judge, Lyallpur, dated the 25th June 1930, convicting the appellants.*

ABDUL AZIZ, for Appellants.

S. M. HAQ, for Government Advocate, for Respondent.

TAPP J. TAPP J.—Sultan (30), Waryam (25) and Ahmun (25) of the Lyallpur District were committed for trial under section 302, read with section 34 of the Indian Penal Code, for causing the death of *Mussammat* Fatteh aged 20, the daughter of Ghulam, on the 28th December, 1929. During the course of the trial the learned Sessions Judge added a charge under section 325 of the Indian Penal Code of causing grievous hurt to *Mussammat* Akbari, a young relative of the deceased, but does not appear to have recorded a conviction under this head.

The learned Sessions Judge declined to apply Section 34 to the act which resulted in the death of *Mussammat* Fatteh, and finding that the appellant Sultan was individually responsible for this and it was not the result of a common intention, convicted Sultan under section 302, Indian Penal Code, and sentenced him to transportation for life.

Varyam and Ahmun were found guilty of causing grievous hurt, convicted of an offence under section 325, Indian Penal Code, and sentenced to five years' and three years' rigorous imprisonment each, respectively.

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It has not been specified in the judgment to whom these two appellants caused grievous hurt and as Waryam, appellant, alone has been found responsible for the grievous hurt sustained by *Mussammat* Akbari and in regard to which there has been no conviction, the only inference is that the learned Sessions Judge has convicted these two appellants of a lesser offence arising out of the death of *Mussammat* Fatteh. It seems to me, therefore, that he has unwittingly applied section 34, but reduced the constructive liability of these two appellants for the murder of *Mussammat* Fatteh to the offence of grievous hurt. In my opinion this is illogical. If the murder of *Mussammat* Fatteh was prompted by a common intention, then on the application of section 34 there can be only one offence, for the commission of which each appellant is equally liable. As observed by their Lordships of the Judicial Committee in *Barendra Kumar Ghose* v. *Emperor* (1), "section 34 deals with the doing of separate acts similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself, for 'that act' and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part because they refer to it."

If as found in the present case there was no common intention to cause hurt to the deceased and the fatal blow dealt by the appellant Sultan was an unpremeditated act springing from his mind alone, then the other two appellants are not constructive participators in that act, even though they may have struck one or more blows. I cannot see how it would be

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logical to hold that while they did not participate in an act of murder owing to the absence of a common intention they are still liable for a lesser offence arising out of that act. The liability for a criminal act done by several persons in furtherance of a common intention is allotted to each of such persons as if he alone and unaided had done that act. In such circumstances each of such persons is guilty of the one offence and in my judgment it is not possible to so grade this offence as to hold, say in the case of a murderous assault, committed in furtherance of a common intention, that some are guilty of murder and others only of causing grievous hurt.

It is unnecessary to discuss the provisions of section 37, as they are not attracted in the present case and there remains only section 38 which is the converse of section 34 and provides for different punishments for different offences where several persons are concerned in the commission of a criminal act, whether such persons are actuated by the one intention or the other.

I consider that on the findings this is the section applicable to the present case and the guilt of the appellant Sultan having been separately determined, that of the other two appellants will have to be similarly determined in respect of acts proved to have been committed by them and not in connection with or relating to the act of Sultan.

Now, as to the facts, the evidence is that some 18 years ago the appellant Sultan was married to the deceased when she was some two years of age in exchange for the marriage of his sister *Mussammat* Mehran to Alawal, the brother of *Mussammat* Sattan, mother of the deceased. For some reason or another the parents of the deceased later refused consumma-

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tion of the marriage and a suit for restitution of conjugal rights by Sultan was dismissed, the marriage being declared to be void. His appeal was also rejected on the 23rd November, 1928, or less than a year before the occurrence.

A marriage was then arranged between the deceased and Hassan, her cousin, and this was fixed for some date about a week after that on which the occurrence took place.

On the 28th December, the deceased, her mother *Mussammat* Sattan, her two cousins *Mussammats* Akbari and Roshan, and her small brother Taju aged 12, were engaged in washing clothes at some water which had collected in a depression in the canal then dry.

About midday the three appellants arrived on the scene armed with *lathis* and Sultan enquired of *Mussammat* Sattan whether *Mussammat* Fatteh was to be sent to him and on being given a negative reply he dealt *Mussammat* Fatteh a blow on the head with his *lathi* which felled her. The other two appellants then each struck the deceased a blow and all three appellants then assaulted and caused hurt to *Mussammat* Sattan and the oher two girls, *Mussammat* Akbari sustaining a grievous injury on the left hand.

The assault on the deceased by the appellant Sultan is fully borne out by the evidence and there is not the shadow of a doubt that he was responsible for causing her death. As stated by himself in the hearing of the witnesses he did not intend that the deceased should go to the arms of another man if she could not come to him.

The medical evidence shows that the deceased bore a contused wound on the head and a contusion on the

right shoulder. Death was due to fracture of the skull and when examined at the trial the Assistant Surgeon stated that injury on the head was probably the result of a single blow, but might have been the result of more than one.

According to *Mussammat* Sattan all three appellants struck the deceased with *lathis* on the head; *Mussammat* Akbari deposed that each of them struck her one blow apparently on the head; *Mussammat* Roshan stated that Sultan dealt her a *lathi* blow on the head and the other two appellants a blow each on the neck and shoulder: Taju, the boy, is to the same effect except that, according to him, the blow dealt by Ahmun fell on the temple.

The conclusion to be drawn from this evidence is, I think, that drawn by the assessors and the learned Sessions Judge that Sultan dealt the fatal blow and the other two appellants inflicted minor injuries. According to the assessors the intention was to carry away *Mussammat* Fatteh and this opinion was shared by the learned Sessions Judge.

On these findings it is clear that there was no common intention to cause hurt to *Mussammat* Fatteh and her death was the result of an act for which the appellant Sultan was individually and solely responsible. The other two appellants, for reasons given above, cannot be held constructively liable for this act, nor can they be held liable for the lesser offence of grievous hurt as arising out of the act of the appellant Sultan. They can be held liable only for causing simple hurt and I would, therefore, alter their convictions to one under section 323, Indian Penal Code, and reduce their sentences to the period of imprisonment already undergone which is nearly six months.

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The act of the appellant Sultan is undoubtedly one of murder and in view of all the circumstances I consider he has been leniently dealt with. I am unable to agree with the learned Sessions Judge that as probably a single blow was dealt a capital sentence was not called for. Sentences should not be measured by the number of blows dealt in a case of this nature. A single blow can be as effective and fatal as several blows which has indeed happened in the present case. It is the intention behind the blow and other concomitant circumstances by which the sentence should be determined. The reason given by the learned Sessions Judge is, therefore, no extenuating circumstance.

I would accordingly affirm the conviction and sentence of Sultan and dismiss his appeal.

BHIDE J.

BHIDE J.—I agree.

N. F. E.

Sultan's appeal dismissed;
Others' sentences reduced.