RAJAGOPALAN AND ANOTHER

v.

THE KING EMPEROR

1944

Feb. 14, 17.

[SIR PATRICK SPENS C. J., SIR SRINIVASA VARADACHARIAR and SIR MUHAMMAD ZAFRULLA KHAN JJ.]

Indian Penal Code (Act XLV of 1860), ss. 34, 149, 302—Unlawful assembly—Murder committed during rioting—Injuries inflicted by several persons—Absence of reliable evidence to show nature of injury inflicted by each—Conviction for murder—Death sentence, whether appropriate.

It cannot be laid down that in the case of a conviction under s. 302 of the Penal Code read with s. 149, the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend on the facts of the case.

A large number of persons including the two appellants, armed with deadly weapons, marched to a salt factory, inflicted injuries upon the guards and peons and set fire to one of the sheds. After most of them had departed the Assistant Inspector of Salt came to the scene and began to chase away the rioters with a bayonet. Some of the rioters rushed back and inflicted a large number of injuries on him and he died on the spot. The High Court found that the appellants were among the seven or eight persons who had inflicted injuries on the deceased but did not accept that part of the evidence which indicated the nature of the injuries which the appellants had actually inflicted:

Held per SPENS C. J. *and* ZAFRULLA KHAN J. (VARADACHARIAR J. *dubitante*), that, assuming that s. 149 and not s. 34 applied to the case, the sentence of death passed on the appellants was not inappropriate in the circumstances of the case.

APPEAL from the High Court of Judicature at Madras. Case No. LX of 1943.

The appellants were tried with 20 others by the Special Judge of Tinnevelly under the Special Criminal Courts Ordinance (No. II of 1942) for various offences arising out of a riot during which a salt factory at Kulasekharapatnam in the Madras Presidency was broken into, the guards and peons were injured, one of the sheds was burnt down and the Assistant Inspector then in charge of the factory was killed. The appellants (accused Nos. 1 and 2) were convicted of murder and sentenced to death. They preferred an appeal to the High Court of Madras under the provisions of Ordinance No. XIX of 1943. The case was also referred to

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the High Court by the Sessions Judge, Tinnevelly, for confirmation of the death sentence. The High Court (King and Shahabuddin JJ.) confirmed the conviction and sentences but granted a certificate under s. 205 of the Government of India Act as the question of the validity of Ordinance No. II of 1942 was involved in the case. The convicts appealed.

M. C. Sridharan for the appellants. The question of the validity of Ordinance No. II of 1942 has been decided by this Court in *Piare Dusadh and Others* v. *The King Emperor* (1). The main question that remains to be decided is that relating to the sentence. The accused's act was not pre-meditated but was done on the impulse of the moment. They had no intention to murder the Assistant Inspector. The High Court does not find that the appellants did actually inflict the injuries on the deceased. The First Information Report does not show the names of the appellants. There is no evidence as to who stabbed the deceased. The appellants can be convicted only under s. 302 read with s. 149, Indian Penal Code. Section 34 cannot be applied to this case.

[ZAFRULLA KHAN J.—Assuming that the case is one under s. 149 and not one under s. 34, is this a case where the lesser sentence should be imposed? The conviction is not based on the mere fact that they were members of an unlawful assembly.]

When the Assistant Inspector appeared he was not attacked. It was only when he bayonetted the rioters that he was attacked and stabbed.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (*N. Rajagopala Iyengar* with him) for the Crown. The trial court finds that the fatal injuries were inflicted by the accused. The appellate court finds that the appellants chased the deceased. All who chased the deceased must be held to have had the intention to kill him. The difference between ss. 34 and 149, Indian Penal Code, is stated in *Barendra Kumar Ghosh* v. *The King Emperor* (2). When it is impossible to prove who inflicted the fatal blow

(1) [1944] F.C.R. 61.

(2) [1925] I.L.R. 52 Cal. 197 at p. 207.

owing to the fact that several persons are acting jointly, all can be convicted of murder under s. 34. Words of s. 34 show that even if some of the accused stand and wait outside while murder is being committed by their associates they will be liable under s. 34.

[VARADACHARIAR J.—In that case the intention to kill was clear. The act of firing was proved. Both the act and the intention have to be inferred in this case].

The finding that the appellants chased the deceased is enough to prove that intention. Section 34 covers different acts done with a common object and makes each liable for the acts of their associates. Section 149 cannot confine the operation of s. 34 to identically similar acts. There is evidence to show common object here and the case is covered by s. 34.

M. C. Sridharan in reply. The case in *Barendra Kumar Ghosh* v. *The King Emperor*(1) is clearly distinguishable. There, all the three accused fired. In such a case it does not matter whose shot killed the deceased. In this case there is nothing to show common intention to murder. The intention was only to raid the salt factory and this was completed before the deceased came on the spot. At any rate the case is one of doubt and benefit of doubt should be given to the accused. The death sentence has been hanging over the accused for more than one year. This is also a ground for giving the lesser sentence.

Sir Brojendra Mitter, Advocate-General of India, (*H. K. Bose* with him) for the Governor-General in Council.

Cur. adv. vult.

Feb. 17. The judgment of Spens C. J. and Zafrulla Khan J. was delivered by Zafrulla Khan J. Varadachariar J. delivered a separate judgment.

ZAFRULLA KHAN J.—During the early hours of the morning of the 20th of September, 1942, a large number of persons stated to be between sixty and seventy, including the two appellants here, armed with deadly weapons, marched to the salt factory at Kulasekhara-

(1) [1925] I.L.R. 52 Cal. 197.

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patnam, inflicted injuries upon the guards and peons, secured their persons, stole a couple of guns and set fire to one of the sheds. Thereafter most of them departed. At that stage an Assistant Inspector in charge of the factory appeared on the scene with a rifle to which a bayonet had been attached. He had apparently no cartridges with him, but proceeded to chase away such of the rioters as were still within the compound of the factory with the help of the bayonet, inflicting one or two injuries which were not of a serious character. While he was thus engaged, a score or so of the rioters who had gone out of the compound rushed back into the compound, and seven or eight of them, including the appellants, set upon him with their weapons and inflicted altogether sixteen injuries upon his person, several of them serious, as the result of which he died on the spot.

Twenty-two of the rioters were put up before the Special Judge of Tinnevelly for trial under the provisions of Ordinance No. II of 1942, on charges of rioting, causing mischief by fire, dacoity and murder. Several of them were convicted of various offences, the appellants being convicted, among other offences, of murder. They were sentenced in respect of that charge to death. Their appeal to the Madras High Court was dismissed, and they have come up to us on appeal on a certificate under s. 205 of the Constitution Act.

The constitutional questions raised in the case are concluded by our judgment in *Piare Dusadh and Others* v. *The King Emperor* (1): (Case No. XXXV of 1943).

On the merits, counsel for the appellants confined his submission to the question of sentence. It was contended that the appellants could be held guilty of murder only by virtue of the provisions of s. 149 of the Indian Penal Code, and that in a case like that a sentence of transportation for life was more appropriate than the sentence of death. On behalf of the Crown it was urged that the case of the appellants fell within the purview of s. 34 of the Indian Penal Code. In the view that we take, it is unnecessary to decide whether

(1) [1944] F.C.R. 61.

s. 34 would or would not apply to the facts as found by the High Court. We are unable to accede to the contention that in case of a conviction under s. 302 of the Penal Code read with s. 149, the appropriate sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Had there been a finding that the appellants, though they were among the rioters some of whom in pursuance of the common object of the unlawful assembly as at that stage constituted, caused the death of the Assistant Inspector, had themselves taken no part in the assault upon the deceased, there might have been some force in the suggestion that the lesser sentence would meet the ends of justice in their case. There is no such finding in this case. On the contrary the finding is that the appellants were among the seven or eight persons who inflicted the large number of injuries which the deceased received, though the High Court did not go so far as to accept that part of the evidence which indicated the nature of the injuries that the appellants had actually inflicted. Having regard to all the circumstances of the case as disclosed in the evidence, we are not disposed to hold in the case of either of the appellants that the sentence of death is inappropriate.

It was suggested with regard to the first appellant that there was doubt whether he had actually inflicted any injury upon he deceased at all, inasmuch as the evidence on this part of the case is that he cut and stabbed the deceased (one witness stating that he did so with an *aruval*), whereas he was alleged to have been armed with a gun. The evidence however discloses no such conflict. The first appellant is alleged to have been armed with a gun during a meeting that was held under his presidentship at some distance from the salt factory, in which it was decided to march to the factory and to commit the riot. The assault upon the deceased took place towards the close of the incidents of that morning, and it might well be that during the interval the first appellant had exchanged the gun for an *aruval* or other cutting instrument. No attempt was made during the course of the cross-examination to discredit

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that part of the testimony of the witnesses who stated that the first appellant had cut and stabbed the deceased. The witnesses were on this point unanimous.

The appellants were in our opinion rightly convicted of the offence of murder and the death sentence is appropriate. As no other point was sought to be raised before us, the appeal is dismissed.

VARADACHARIAR J. I feel some difficulty in sustaining the sentence of death imposed on the first accused. His counsel did not challenge the finding that the two appellants were "amongst those who actually chased Mr. Loane when he was bayonetting the rioters inside the compound of the factory". The word "chased" is perhaps apt to mislead. All that the evidence shows is that these persons ran from several directions towards the spot where the Assistant Inspector was chasing and bayonetting some of their comrades. The question then is, under what provision of law is the first accused to be convicted with reference to the murder of Mr. Loane.

The Special Judge had no difficulty in convicting him under s. 302 of the Indian Penal Code, because he accepted the evidence of P. Ws. 1, 2, 4 and 5 who deposed that the first accused was one of those who cut and stabbed the deceased. P. W. 5 specifically stated that the first accused cut the deceased with an *aruval* (a big curved knife). This evidence was criticised before the High Court with some force, on behalf of the appellants. It was pointed out that these witnesses who had themselves been injured and had been tied up with ropes and left to roll on the ground at a spot not less than 40 feet away from where the Assistant Inspector was being attacked could not have observed which amongst a crowd of about 20 persons surrounding the deceased directly inflicted cuts or injuries on him. It also appears from the evidence that about this time the hut which had been set fire to had more than half burnt down and there was no other light in a dark night. In view of this criticism, the learned Judges observed, rightly, if I may say so, as follows: "It may be that having regard to the fact that the persons who chased Mr. Loane were 20 in number, these wit-

nesses were not able to see the particular accused specified by them actually cutting and stabbing him. But there can be no doubt that these witnesses saw the accused specified by them among the persons who chased Mr. Loane and presumed that they participated in the actual attack."

This being their opinion on the direct evidence connecting the first accused with the murder, the learned Judges had to deal with the argument urged with reference to ss. 34 and 149 of the Indian Penal Code. On this, they say: "Mr. Jayarama Iyer would have us hold that at the worst appellants 1 and 2 could be held guilty of murder only in virtue of s. 149 and not s. 34, Indian Penal Code, and he urges that in this view the lesser sentence should be awarded. We are unable to accept this contention. Having regard to the probabilities of human conduct, everyone who chased Mr. Loane cannot but be reasonably considered to have shared the intention to kill him." I understand this observation to imply that if the case had to be dealt with as one falling under s. 302 read with s. 149 of the Indian Penal Code, the learned Judges would not have been prepared to confirm the death sentence. They were obviously dealing with the case as one falling under s. 34. I do not therefore think that we shall be justified in affirming the sentence of death independently of the question whether the case falls within s. 34 or only under s. 149. Even with reference to the distinction adverted to in the judgment just delivered by my Lord and my learned brother as to the practice in awarding sentence in cases falling under s. 149, it would not be unimportant to ascertain whether the first accused was only among those who were said to have run to the spot where the Assistant Inspector was bayonetting some of their comrades or also himself took part in the assault upon the deceased.

There is this noticeable distinction in the evidence between the case against the second accused and the case against the first accused, *viz.*, that both before the assault on the deceased and after the assault on the deceased, there is specific evidence that the second

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accused was armed with a hatchet and it was also the prosecution case that it was the second accused that cut P. W. 2 on the head with a hatchet. As regards the first accused, there is no specific evidence that he carried any other arm except a gun, though it is not clear at what stage of the proceedings he carried this gun. From the medical certificate relating to the wounds on the deceased, it is not possible to say that any of the wounds are likely to have been inflicted by the first accused, if he had only a gun and it is nobody's case that he fired the gun at any time. When the learned Judges of the High Court have not relied on the direct evidence of P. Ws. 1 to 5 to the effect that the first accused stabbed the deceased or cut him with an *aruval,* I do not think that those very statements can be relied on as proving that the first defendant carried an *aruval* or other cutting instrument; nor would it be right to treat the matter as one in respect of which the burden of proof lay on the first accused, because this is not a case in which he was relying on any of the general exceptions or special exceptions or provisos. It is also not without some significance that the first accused is not mentioned by any witness as having inflicted any injury on the peons P. Ws. 1 to 5. I am therefore unable to draw the inference that the first accused must have taken some part in the *acts* which resulted in the death of the Assistant Inspector and without such an inference it will be difficult to bring the case within s. 34 of the Indian Penal Code.

Even as regards the question of "common intention," I am not at all sure that the learned Judges of the High Court were justified in assuming that those who chased Mr. Loane "did so to wreak vengeance". The position was that after the shed had been set on fire, the crowd was dispersing in various directions and most of them had gone out of the compound of the salt factory. It was at this stage that Mr. Loane appeared on scene and chased and bayonetted some members of the crowd who were actually running away. If at that stage some other members of the crowd who were on the point of dispersing went to the spot where their

comrades were being attacked, it was quite likely, as the learned Judges also recognised, "that their main object was to rescue their comrades". But they follow this up with the remark, "the conclusion that they intended to effect that object by killing Mr. Loane is irresistible, as they must have realized that they could not achieve that object otherwise". I am not satisfied that this does not go too far. The scattering mob very probably acted only on an impulse to go and see what was happening to their comrades and it seems too much to impute to them sufficient knowledge or a common intention that they could or should be rescued by killing the Assistant Inspector. Our attention was drawn to the observations of the Judicial Committee in *Barendra Kumar Ghosh* v. *Emperor*(1). That judgment proceeds on the footing that the common intention to kill the postmaster was clearly established and the *act* of the accused whose conviction was challenged was also proved beyond doubt, namely, that he had fired at the postmaster, though the shot missed and the postmaster was killed by a shot fired by another of the co-accused. There was accordingly no difficulty in holding that the case was covered by s. 34, Indian Penal Code. The discussion was as to the result of its application. Here, the common intention of the crowd and some "act" on the part of the first accused have both to be inferred from the fact that the Assistant Inspector was murdered and that the accused was one of the crowd who ran to the place where the deceased was chasing some of the rioters.

The question however is bound up with inferences of fact with which it is not the ordinary practice of this Court to interfere and, as my Lord and my learned brother think that the death sentence was justified, I leave the matter there, with this expression of my doubt.

Appeal dismissed

Agent for the Appellants : *Naunit Lal.*

Agent for the Respondent : *Ganpat Rai.*

(1) [1925] I.L.R. 52 Cal. 197.