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Duni Chand Rataria v. *Bhuwalka Brothers Ltd.*

Bhagwati J.

Ordinance came within Head 27 of List 2 of the Seventh Schedule of the Government of India Act:—"Trade and commerce within the Province; markets and fair; money lending and money lenders", and that the Provincial Legislature was competent to legislate on that topic.

The result therefore is that the appeal will be allowed, the decision of the Appeal Court will be reversed and the decree passed by the Trial Court in favour of the Appellant will be restored with costs throughout.

Appeal allowed.

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December 3.

[MUKHERJEA, S. R. DAS and VIVIAN BOSE JJ.]

Indian Penal Code (Act XLV of 1860), s. 34—Prior concert—Common intention—Same or similar intention—Distinction between.

It is well-settled that common intention in s. 34 of the Indian Penal Code presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case.

Care must be taken not to confuse same or similar intention with common intention; the partition which divides their bounds is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must

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be pre-arrangement and premeditated concert. It is not enough, to have the same intention independently of each other.

The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. It is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, in other words, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.

When appellate judges, who agree on the question of guilt differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons.

Barendra Kumar Ghosh v. *King-Emperor* ([1924] L.R. 52 I.A. 40), *Mahbub Shah* v. *King-Emperor* ([1945] L.R. 72 I.A. 148) and *Mamand* v. *Emperor* (A.I.R. 1946 P.C. 45), referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 91 to 93 of 1954.

Appeals by Special Leave granted by Supreme Court on the 18th January, 1954 from the Judgment and Order dated the 18th June, 1953 of the High Court of Judicature at Hyderabad in Confirmation Case No. 376/6 of 1952-53 and Criminal Appeals Nos. 394/6, 395/6 and 392/6 of 1952-53 arising out of the Judgment and Order dated the 2nd June, 1952 of the Court of the Sessions Judge at Bidar in Sessions Case No. 9/8 of 1951-52.

J. B. Dadachanji and *Rajinder Narain,* for the appellant. (In Criminal Appeal No. 91 of 1954).

N. C. Chakravarty, for the appellants. (In Criminal Appeals Nos. 92 and 93 of 1954).

P. A. Mehta and *P. G. Gokhale,* for the respondent.

1954. December 3. The Judgment of the Court was delivered by

BOSE J.—Five persons, including the three appellants, were prosecuted for the murder of one Ramchander Shelke. Each was convicted and each was

sentenced to death under section 302 of the Indian Penal Code.

The appeals and the confirmation proceedings in the High Court were heard by M. S. Ali Khan and V. R. Deshpande, JJ. They differed. The former considered that the convictions should be maintained but was of opinion that the sentence in each case should be commuted to imprisonment for life. The latter favoured an acquittal in all five cases. The matter was accordingly referred to a third Judge, P. J. Reddy, J. He agreed with the first about the convictions and adjudged all five to be guilty under section 302. On the question of sentence he considered that the death sentences on the three appellants, Pandurang, Tukia and Bhilia, should be maintained and that those of the other two should be commuted to transportation for life.

It seems that the opinion of the third Judge was accepted as the decision of the Court and so the sentences suggested by him were maintained as well as the convictions.

All five convicts then applied to the High Court for leave to appeal. The petition was heard by Ali Khan and Reddy, JJ. and they made the following order :

"The circumstances of the crime in this case were such that a brutal murder had been committed and sentence of death was the only one legally possible for the Sessions Judge to have passed and it was confirmed by the High Court".

Leave to appeal was refused.

Pandurang, Tukia and Bhilia, who were sentenced to death, applied here for special leave to appeal. Their petition was granted. The other two have not appealed.

The prosecution case is this. On 7-12-1950, about 3 o'clock in the afternoon, Ramchander Shelke (the deceased) went to his field known as "Bhavara" with his wife's sister Rasika Bai (P.W. 1) and his servant Subhana Rao (P.W. 7). Rasika Bai started to pick chillies in the field while Ramchander went to another field "Vaniya-che-seth" which is about a furlong away. We gather that this field is near a river called

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Papana. Anyway, Rasika Bai heard shouts from that direction, so she ran to the river bank with Subhana and they both say that they saw all five accused attacking Ramchander with axes and sticks.

Two other persons, Laxman (P.W. 6) and Elba (P.W. 5), who were in the neighbourhood, also heard the cries and ran to the spot. They also say they witnessed the assault and name all five accused. The former has a field near by and was working in it; the latter was a passer-by.

Rasika Bai shouted out to the assailants not to beat Ramchander but they threatened her and then ran away. Ramchander died on the spot almost immediately.

There are four eye-witnesses, and the main question we have to consider is whether they can be believed. Ordinarily, we would not have enquired into questions of fact but as three persons have been sentenced to death on the opinion of the third Judge, despite the opinion of one that the death sentence should not be imposed and of the other that the appellants are not guilty and so should be acquitted, we have deemed it advisable to examine the evidence.

Two of the eye-witnesses were considered unreliable by Reddy, J. in the High Court, so we will omit them from consideration and concentrate on the other two, Rasika Bai (P.W. 1) and Subhana (P.W. 7). Both give substantially the same version of what they saw of the assault. They heard Ramchander's cries from the direction of the river bank and rushed there. They say they saw all five accused striking him, the three appellants Pandurang, Tukia and Bhilia with axes, the other two, who have not appealed, with sticks. It is said that there is some discrepancy between Rasika Bai's statement in the Sessions Court and in the Committal Court about the order in which the blows were given and their number. Ali Khan, J. and Reddy, J. considered this unimportant and so do we. The important thing is that both witnesses are agreed on the following points—

(1) that Tukia struck Ramchander on his cheek;

Rasika Bai adds that he also struck him on the head;

(2) that Pandurang hit him on the head;

(3) that after these blows Ramchander fell down and then Bhilia hit him on the neck.

Subhana does not say that the other two struck any particular blow. Rasika says that one of them, Nilia, hit Ramchander on the thigh with his stick and assigns no particular blow to the other.

Rasika Bai's version is that on seeing the assault she called out to the accused not to hit but they "raised their axes and sticks" and threatened her, and then ran away. Subhana merely says that they ran away.

After this all the accused absconded. They were arrested on different dates and were committed to trial separately. The dates of arrest and committal respectively in the case of each are as follows :—

Bhilia	9-1-1951	and 14-6-1951
Tukia	13-10-1951	and 10-1-1952
Pandurang	31-8-1951	and 10-1-1952
Tukaram	13-4-1951	and 29-9-1951
Nilia	13-10-1951	and 10-1-1952

The main attack on this evidence was directed to the fact that neither the accused nor the eye-witnesses are named in the First Information Report. According to the prosecution, the report was made in the following circumstances.

Rasika and Subhana say that after the assault they went back to the village and told Rasika's sister Narsabai, P.W. 2 (the deceased's widow) what they had seen. Narsabai says that they disclosed the names of the assailants at that time.

From here we go to the Police Patel who lives in a neighbouring village one mile away. He is Mahadappa (P.W. 9). He says that he was standing outside his house in his own village when the sun was setting and saw Krishnabai, the mother-in-law of the deceased, crying as she passed by outside his house. He asked her what was wrong and she told him that her son-in-law had been killed. On hearing this he wrote out

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a report, Ex. No. 4, and sent it to the Police Station at Udgir which is about six miles from the scene of the murder. The First Information Report was recorded on the basis of this report at 10 o'clock the next morning.

Now nobody tells us who carried the report to the Police Station. It is written on a printed form and is signed by the Police Patel. Opposite the column headed "Name and address of the complainant or informant" is entered "Tukaram s/o Panda Sheolka". The Sub-Inspector, who wrote out the first information report on the basis of this report, entered the following in it:

"I am to submit that today a report dated 7-12-1950 from the Police Patel, Neemgaon village, has been received stating that (1) Tukaram, s/o Panda Sheolka, r/o Neemgaon village, came and stated that on 7-12-1950 Ramchander, s/o Govind Reddy was murdered, etc".

The Police Patel tells us that this Tukaram is a cousin of the deceased. He also says that—

"Tukaram, whose name is entered in column No. 2, is not the informant but is the complainant in this case. Tukaram had not given any written complaint to me. He had not given oral information to me. When I saw Krishnabai weeping and going, I did not know where Tukaram was. I do not know whether Tukaram was present in the village on that day or not".

This does shroud the matter in mystery but the fact that the report was made is, we think, beyond dispute, also that it was made about 10 o'clock the following morning. It is to be noted that the Sub-Inspector does not say that *Tukaram* brought the report to him but that *Ex. 4* (the report received from the Police Patel) states that Tukaram gave the Police Patel the information. In that he is not right (though the mistake is natural enough), because Ex. 4 merely places Tukaram's name opposite the printed column headed "complainant or informant". That leaves the matter equivocal but in view of what the Police Patel tells us, we think that he did mean to convey that

Tukaram was the complainant, probably because he did not want to enter a woman's name and so picked on the nearest male relative. We see no reason to doubt his statement. He says he did not know any names at that time; and that is evident from the report. But what the learned counsel for the appellants says is that he saw Narsabai on the evening of the murder and as she did not give him any names it is evident that no one knew who the assailants were and that therefore the accusation made against the accused was a subsequent concoction and that it was for that reason that they waited till the next morning before reporting the matter to the police.

The Police Patel Mahadappa admits that he went to the scene of the occurrence the same night and that he stayed there the whole night. He also admits that he saw Narsabai there but says he did not speak to her. We have no doubt that he learned the names of the assailants when he went there but this was after he had sent his report. There is some mystery about the report. It did not reach the Police Station till 10 A.M. the next day though it was written about sunset the evening before, but as we do not know who took it and why he delayed it is idle to speculate. What is certain is that there was no point in sending off a report without names the next morning if the idea of delay was to concoct a story and implicate innocent persons. They would either have hit on the names by then or would have waited a little longer until they made up their minds about the story they intended to tell. The haphazard way in which the report was written and despatched indicates rustic simplicity rather than clever and well planned deceit. It has to be remembered that the deceased left no male relatives except this cousin Tukaram, about whom the Police Patel speaks, and his father Pandu, and though cause for enmity between Ramchander and three of the appellants is disclosed, there is nothing to connect this Tukaram or his father Pandu with the quarrel; and no one suggests that anybody else bore them a grudge. We think it unlikely that these three women, Rasikabai, Narsa-

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bai and Krishnabai, would have been capable of concocting this elaborate story and of influencing the Police Patel to stay his hand till they had thought of a suitable tale and found likely victims for their plot. Moreover, the whole village probably turned out as soon as the news spread; in any case the witnesses are agreed that there was a large crowd there. We think it would have been easy to find many persons to say that though they asked Rasikabai and Subhana and Narsabai and others present to tell them what had happened, nobody could because no one knew. It would be ridiculous to suppose that the whole village bore the accused a grudge and joined in an elaborate conspiracy against them. In the circumstances, we think Mahadappa told the truth. The absence of the names in the report is therefore not of much consequence in this case especially as the names were disclosed in full at the time of the inquest. All the witnesses who speak about this are agreed on that point.

Once that hurdle is surmounted, there is very little else to criticise in the evidence of Rasikabai and Subhana, bar unimportant discrepancies and the fact that they have made a few small and unimportant contradictions between their testimony in court and some of their numerous earlier statements. There were three sets of committal proceedings, and of course the usual questioning by the police and then the proceedings in the Sessions Court, so it is not surprising that these simple rustics should get confused and not remember in minute detail exactly what they had said from stage to stage. But the major part of their story hangs together remarkably well despite the many attempts to trip them in cross-examination in the various courts. As Reddy, J. has dealt with these discrepancies in detail, we need not go over it all again.

The injuries shown in the Inquest Report and the post-mortem report do not tally. It is questionable how far an inquest report is admissible except under section 145 of the Indian Evidence Act but we do not regard the difference as of value so far as the appel-

lants are concerned; at best it could only have helped Tukaram and Nilia who have not appealed.

The Inquest Report shows eight injuries. The first four are incised wounds and tally with the evidence given by the witnesses. The remaining four are described as "blue and black marks". The post-mortem mentions the first four but not the others. The doctor was recalled by the High Court and he gives some sort of explanation about post-mortem stains on the body which we do not think is satisfactory, but the utmost this shows is that no stick blows were found on the body and that we are prepared to accept.

On a careful consideration of the evidence we think Rasika and Subhana are telling the truth and that they can be relied on. We will not rely on the other two witnesses. We are prepared to disregard the evidence of Rasika and Subhana in so far as they say that Tukaram and Nilia also beat Ramchander because the medical evidence does not disclose any injuries which could have been caused by a stick or sticks. As a matter of fact Subhana does not ascribe any particular blow either to Tukaram or to Nilia though he does describe in detail what the other three did. All he says about Tukaram and Nilia is that—

"The accused present were striking Ramchander; Pandurang, Bhilia and Tukia were holding axes. Tukaram and Nilia had sticks in their hands".

This sort of omnibus accusation is not of much value, and Rasikabai is not much better though she does say that Nilia hit Ramchander on the thigh. Except for this, all she says is that

"We saw the accused present striking Ramchander Shelke".

We think Rasika and Subhana are telling the truth when they say that these two accused were also there but we think that because of that they think they must have joined in the attack and so have added that detail to their story. It is also possible that Nilia did hit out at Ramchander but that the blow did not land on his body. In any case, they only

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had sticks in their hands which have not even been conceded the dignity of lathis. So the part they played was negligible.

We have looked into their cases to this extent so that we can set them on one side in determining who was responsible for the remaining injuries and also because the part they played will be necessary in determining the extent of the common object or intention, if any.

The medical evidence shows that the injury that caused death was the one on the neck. All the eye-witnesses are agreed that Bhilia was responsible for that. We refer to the other eye-witnesses here to show that there is no discrepancy on this point, but we only rely on Rasikabai and Subhana for determining the fact. Bhilia was directly charged with the murder and the injury on the throat is ascribed to him in the charge. His conviction cannot therefore be assailed on any of the technical points which arise in the case of the other two. We uphold his conviction under section 302 of the Indian Penal Code.

The injury on the throat having been accounted for, we are left with three. They are—

(1) an incised wound on the scalp above the left ear,

(2) an incised wound on the scalp, central part, and

(3) a lacerated wound on the left side of the face which crushed the upper and lower jaws including the lips and teeth.

The doctor says that (1) and (2) could not have caused death but that the third could. Rasikabai and Subhana are agreed that the only person who struck on the cheek is Tukia. Rasikabai adds that he also hit Ramchander on the head. That means that Tukia and Pandurang caused the two non-fatal injuries on the head, one each, and that Tukia alone caused the fatal one on the cheek. Tukia's conviction under section 302 of the Indian Penal Code was therefore justified.

In Pandurang's case we are left with the difficult question about section 34 of the Indian Penal Code.

But before we deal with that, we will set section 149 of the Indian Penal Code aside. There is no charge under section 149 and, as Lord Sumner points out in *Barendra Kumar Ghosh* v. *King-Emperor*(1), section 149, unlike section 34, creates a specific offence and deals with the punishment of that offence alone. We would accordingly require strong reasons for using section 149 when it is not charged even if it be possible to convict under that section in the absence of a specific charge, a point we do not decide here. But that apart, there is, in our opinion, no evidence here which would justify the conclusion of a common object even if one had been charged.

There is some vague evidence to the effect that there had once been a dacoity at Ramchander's house and that he suspected "the accused" and reported them to the police who arrested them, but nothing came of it and they were later released. This is put forward as one of the grounds of enmity and to show why all five joined in the attack. But in the absence of anything specific we are not prepared to act on such a vague allegation especially about the persons who are said to have been wrongfully blamed. What, however, is more specific is this: Ramchander bought a field called Hatkerni at Neemgaon from one Shivamma Patelni about a year before the murder. Narsabai tells us that the three accused Nilia, Bhilia and Tukia, all of whom are Lambadas used to live in that field. When Ramchander bought it he turned them out and she says that that gave them cause for enmity against him.

Now even if it be accepted that this evidence is indicative of prior concert, it only embraces the three Lambadas, Nilia, Bhilia and Tukia. Pandurang, who is a Hatkar, is not included. As this is the only evidence indicating a common purpose, and as we know nothing about what preceded the assault (for the witnesses arrived after it had started), we cannot gather any common object from the fact that Pandurang, though armed with an axe, only inflicted a light blow on the scalp which did not break any of the

(1) (1924) L. R. 52 I. A. 40, 52.

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fragile bones in that region and from the fact that two others who were lightly armed with what have been called "sticks" inflicted no injuries at all. Section 149 is therefore out of the question.

Turning now to section 34, that was not charged in Pandurang's case but we need not consider whether such an omission is fatal because even if it had been charged there is no evidence from which a common intention embracing him can legitimately be deduced.

As we have just said, the witnesses arrived at a time when the beating was already in progress. They knew nothing about what went before. We are not satisfied that Tukaram is proved to have done anything except be present, and even if it be accepted that Nilia aimed a blow at Ramchander's thigh he was so half hearted about it that it did not even hit him; and in Pandurang's case, though armed with a lethal weapon, he did no more than inflict a comparatively light head injury. It is true they all ran away when the eye-witnesses arrived and later absconded, but there is nothing to indicate that they ran away together as a body, or that they met afterwards. Rasikabai says that the "accused" raised their axes and sticks and threatened her when she called out to them, but that again is an all embracing statement which we are not prepared to take literally in the absence of further particulars. People do not ordinarily act in unison like a Greek chorus and, quite apart from dishonesty, this is a favourite device with witnesses who are either not mentally alert or are mentally lazy and are given to loose thinking. They are often apt to say "all" even when they only saw "some" because they are too lazy, mentally, to differentiate. Unless therefore a witness particularises when there are a number of accused it is ordinarily unsafe to accept omnibus inclusions like this at their face value. We are unable to deduce any prior arrangement to murder from these facts.

Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the

criminal act of another, the act must have been done in furtherance of the common intention of them all: *Mahbub Shah* v. *King-Emperor*(1). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Ghosh* v. *King-Emperor*(2) and *Mahbub Shah* v. *King-Emperor*(1). As their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example, when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack—not even immediately before. Pandurang is not even of the same caste as the others.

(1) [1945] L.R. 72 I.A. 148, 153, 154.
(2) [1924] L. R. 52 I.A. 40, 49.

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Bhilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as, for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again,

"the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case".

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (Sarkar's Evidence, 8th edition, page 30).

The learned counsel for the State relied on *Mamand* v. *Emperor*(1) because in that case the accused all ran away and their Lordships took that into consideration to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing, and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away *together*: not simply that they ran away at the same moment of time when discovered, but that they ran away *together*. As we have said, each case must rest on its own facts and the mere

(1) A.I.R. 1946 P.C. 45.

similarity of the facts in one case cannot be used to determine a conclusion of fact in another. In the present case, we are of opinion that the facts disclosed do not warrant an inference of common intention in Pandurang's case. Therefore, even if that had been charged, no conviction could have followed on that basis. Pandurang is accordingly only liable for what he actually did.

In our opinion, his act falls under section 326 of the Indian Penal Code. A blow on the head with an axe which penetrates half an inch into the head is, in our opinion, likely to endanger life. We therefore set aside his conviction under section 302 of the Indian Penal Code and convict him instead under section 326. We are of opinion that in his case a sentence of imprisonment for a term of ten years will suffice. We accordingly set aside the sentence of death and alter it to one of ten years' rigorous imprisonment.

That leaves the question of sentence in the case of Bhilia and Tukia. It was argued that no sentence of death can be passed unless two Judges concur because of section 377 of the Code of Criminal Procedure, and it was argued that section 378 of the Code does not abrogate or modify that provision. We do not intend to examine that here because we are of opinion that the sentence should be reduced to transportation in these two cases mainly because of the difference of opinion in the High Court, not only on the question of guilt, but also on that of sentence. In saying this we do not intend to fetter the discretion of Judges in this matter, for a question of sentence is, and must always remain, a matter of discretion, unless the law directs otherwise. But when appellate Judges, who agree on the question of guilt, differ on that of sentence, it is usual not to impose the death penalty unless there are compelling reasons. We see no reason to depart from this practice in this case and so reduce the sentences of death in the case of Bhilia and Tukia to transportation for life because of the difference of opinion in the High Court.