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Court : Allahabad

Decided On : Nov-27-1946

Reported in : AIR1948All229

Appellant : Nazir and ors.

Respondent : Emperor

Judgement :

Raghubar Dayal, J.

1. Nazir Sikandar and Babu appeal against their conviction under Sections 302, 307, 894 and 366, Penal Code. Maru and Abdul Latif appeal against their conviction under sections 366 and 368, Penal Code. Maru also appeals against his conviction under Section 411, Penal Code. Nazir and Sikandar were sentenced to death under Section 302, Penal Code and the reference for the confirmation of the death sentence is also before us.

2. Nazir and Sikandar accused are residents of village Kuteaca, police station Titavi, district Muzaffarnagar. Mst. Prakasho, P.W. 7, daughter of Jaggu P.W, 36, was also a resident of the same village. She was married to Meghraj deceased who was resident of village Tejalhera which is at a distance of 12 kos equivalent to about 15 miles from village Kutesra Babu accused is a resident of village Buddha Khera, 1 1/2 miles from village Kutesra.

3. The full prosecution story is narrated by Mst. Prakasho P.W. 7, and is briefly as follows: Nazir and Sikandar accused teased and molested her some time before the incident in suit. They were also suspected to have committed a theft at her father's house 20 or 25 days before this incident.

4. Mst. Prakasho left village Kutesra a little after sunrise on the day of the incident, the 1st of June 1945, on a tonga with her husband, Meghraj, and his younger brother Atma Ram, P.W. 1. When they reached a place close to Baruwala well, Atma Ram got down to see who there the tonga could pass over the drain cut across the passage. Nazir and Sikandar accused armed with, lathi and tabal came from the side of the well and began to strike Atma Ram with them. Meghraj also got down and was beaten by these two accused with the same weapons. During this beating Babu accused and Mukkha approver, P.W. 20, came up and drove away the tonga in which Mt. Prakasho was seated. Nazir and Sikandar joined the party after some time. Nazir subsequently took Mt. Prakasho to the house of Mara in village Churni. After staying there for a few days she was taken to the house of Abdul Latif accused at Thanesar, Punjab. Mt. Prakasho was recovered from the house of Abdul Latif.

5. Atma Ram, P.W. 1, lodged a report, Ex. P 2, at 10 p.m. on the 1st June. In this report he mentioned the incident of the beating and the driving away of the tonga and Mt. Prakasho. He mentioned that the four miscreants appeared to be Musalmans.

6. Meghraj deceased received 16 injuries, fifteen of which were undoubtedly caused with a sharpedged weapon. Five incised wounds were on different parts of the head. The sixteenth in jury which could also be caused with a blunt weapon was an abrasion, 1'x 1/2' on the top of the left shoulder. All the injuries were simple. He died during the examination of his injuries on the morning of 2nd June.

7. Atma Ram had eleven injuries on his person, five of which were due to a blunt weapon. Five were incised wounds due to a sharp-edged weapon and one was an abrasion.

8. Mukkha, approver, P.W. 20, was arrested on 4-6-1945. At the time of arrest he received certain injuries. He made the confession, Ex. P-1, on 8-6-1945. He described how he and the other three accused, namely, Nazir, Sikandar and Babu, combined together to abduct Mt Prakasho. His description of the main incident is practically the same as given by Atma Ram and Mt. Prakasho. He, however, states that both Nazir and Sikandar were armed with tabals and that Atma Ram was beaten with slaps. He was subsequently tendered pardon and examined as a witness. In his deposition in Court he deposes one more significant fact and that is that Nazir Sikandar and Babu had told Mukkha on enquiry that the tabals were taken along with them in order to kill the husband of Mt. Prakasho in order to be able to abduct her. He further deposes that at the Baruwala well it was decided that Nazir and Sikandar would assault and kill the husband of Mt. Prakasho and his younger brother and that Babu and he would take away the tonga with Mt. Prakasho therein.

9. Nazir accused was arrested on 17-6-1945. Babu accused was arrested on 28-6-1945. Sikandar accused was arrested sometime by 18-7-1945 when he was admitted to jail. These accused were put up for identification and were identified by some witnesses including those who are stated to have seen them before or after the incident.

10. We may say at once that the case against Maru and Abdul Latif is not established. There is nothing on the record to show that they knew that Mt. Prakasho was an abducted or kidnapped woman. Mt. Prakasho does not depose that at any time she told them her story. She simply deposes that she had related her story to their wives. That is not sufficient to bring home the guilt under Sections 366 and 368 to these two accused. The offence under Section 411, Penal Code, with respect to Maru's dishonestly receiving or retaining the stolen tonga, bullocks and other articles is also not established, as there is nothing to show that Maru knew or had reason to know that these things were stolen property.

11. There is good evidence on the record to establish the prosecution version that Nazir and Sikandar accused beat Atma Ram and Meghraj with lathi and tabal and that Babu accused and Mukkha approver drove away the tonga in which Mt.

Prakasho was seated. The evidence consists of the statements of Mukkha approver, Mt. Prakasho and Atma Ram. Atma Ram identified Babu, Nazir and Mukkha correctly. He could not identify Sikandar. He, however, deposed in Court that Sikandar was one of the assailants. Mt. Prakasho knew Sikandar and Nazir and names them. She deposed that Babu was the person who drove away the tonga. She did not identify Babu in the jail. She states that her father had told her not to identify Babu. The explanation does not appear to be very reasonable unless such a statement might have been made by her father to induce her to go to the identification parade in spite of her illness. According to the statement of Mr. Trivedi, Magistrate, P.W. 38, who conducted the identification proceedings, Mt. Prakasho took about 20 minutes in her attempt to identify and then said that she was unable to identify Babu. Mukkha knows all the three accused and names them. There is no good reason to doubt the statements of Atma Ram and Mt. Prakasho. Mukkha's statement deserves scrutiny, he being an approver. He also improved upon his statement in the confession made on 8th June. The improvement seems to have been made, in view of the Privy Council ruling reported in Mahboob Shah v. Emperor . The other inconsistencies between the two statements are not of sufficient importance to discredit his testimony. We are not, therefore, prepared to accept his statement about the expression of the common intention to kill Meghraj before the incident, though such an expression of intention is not unlikely. We do not see any good reason to disbelieve his statement on other particulars about the incident, specially when that statement is fully borne out from the statements of Atma Ram and Mt. Prakasho. His statement about the conduct of the accused prior and subsequent to the incident is also borne out from the statements of other witnesses.

12. Nur Mohammad, P.W. 16, and Mohammad, P.W. 17, both residents of village Kutesra, depose to have seen the four accused pass in front of the chaupal in village Chappar and proceed towards Chhapar side and to have seen Mt. Prakasho with her husband and a boy proceed in the same direction after some time. There is nothing against these witnesses. The mere fact that Nur Mohammad's father had filed a criminal case against Sikandar's uncle long ago is no reason to ignore his statement.

13. Rahimuddin, P.W. 18, and Bashir, P.W. 26, depose to have seen the four accused come from the side of Kutesra and to have seen Mt. Prakasho and others come from the same side after some time. There is nothing to discredit them.

14. Mukhtara and Baldeo Singh, P.Ws. 3 and 4 respectively depose to have seen the four persons sitting on the Baruwala well when they went there to drink water. They pointed out all the four accused in Court as those persons. Mukhtara, however, identified Babu, Mukkha and Sikandar in the jail. Baldeo Singh identified Mukkha and Nazir in the jail. There is no particular reason to disbelieve them.

15. Chhota, P.W. 5, deposes to have seen Mt. Prakasho driven in a tonga by Babu accused. He also correctly identified Babu. Babu happened to enquire from him the way to village Chappar.

16. Harphul, P.W. 15, and Kundan, P.W. 19, depose to have seen Mt. Prakasho going in a bullock tonga through village Chappar and that Babu accused was driving it. According to Harphul, Sikandar was following it at some distance, and according to Kundan, Mukkha was following. They saw at different places and, therefore, their noticing different persons following the tonga is not of consequence when both persons were following the tonga at some distance from each other. Both these witnesses identified Babu accused correctly. There is no reason to discredit their statements.

17. Mr. Akbar Husain, P.W. 9, deposes about Nazir accused taking him to the house of Abdul Latif accused and about the recovery of Mt. Prakasho from there.

18. Dal Singh, P.W. 10, Piru, P.W. 11, and Jhandu Ram, P.W. 18, depose about Nazir being with Mt. Prakasho at Karnal and Thanesar.

19. Nazir and Sikandar made no statements before the Committing Magistrate reserving their statements for the Sessions Court. Babu denied the prosecution allegations, accounted for the statements of the prosecution witnesses due to the influence of police and alleged enmity with Mukkha. Nazir stated in the Sessions Court that he had quarrelled with one Nasiruridin constable who got him arrested. He denied the prosecution allegations and alleged enmity with Rahim Uddin

Bashir, Nur Mohammad and Mohammad, prosecution witnesses. He has no enmity with Jaggo, father of Mt. Prakasho. He is unable to say why the other prosecution witnesses including the three main witnesses, namely, Atma Ram, Mt. Prakasho and Mukkha, deposed against him. Sikandar alleged enmity with the prosecution witnesses other than Atma, Ram and Mt. Prakasho. Babu made no substantial addition to his statement before the Committing Magistrate. Babu accused just examined two witnesses in defence about his good character.

20. We are of opinion that it is sufficiently established that Nazir, Sikandar and Babu accused and Mukkha approver joined together to abduct Mt. Prakasho and planned together that Nazir and Sikandar would beat her husband and his younger brother with tabal and lathi, while Babu and Mukkha would drive away Mt. Prakasho in the tonga.

21. We are further satisfied that they carried out what they had planned. There is no doubt that each of these three accused, namely, Nazir, Sikandar and Babu committed the offences under Sections 366 and 394, Penal Code, as those offences were committed by Babu and Mukkha in furtherance of the common intention.

22. Atma Ram, P.W. 1, deposes that Nazir had a lathi and Sikandar had a tabal. Mt. Prakasho, P.W. 7, deposes that Sikandar struck her husband and his younger brother with the tabal, Ex. M-15, which was recovered from the house of Babu accused. Mukkha approver, P.W. 20, deposes that both Nazir and Sikandar used tabals in the assault. In his confession he stated the same. In this state of evidence and in view of the nature of injuries on Atma Ram, it cannot be said that both Nazir and Sikandar were armed with tabals and that the statement of Mukkha is correct on this point. The statement of Mt. Prakasho with respect to the accused having the tabal is not to be believed fully when she made inconsistent statements as to which of these two accused threatened her with the tabal on the way. We are, therefore, not in a position to hold conclusively as to which of the two accused used his tabal in the attack on Meghraj.

23. It has been argued that Babu cannot be guilty of the offences under Sections 302 and 307, Penal Code, with respect to the beating of Meghraj and Atma Ram

as he was not present during the entire beating, and as it cannot be held that has previous agreement if any, about the use of the tabal extended to such use of this weapon as to result in the commission of such offences. Similarly, it is argued for Sikandar and Nazir that, in the absence of very good evidence as to who among them used the tabal, none of them can be guilty of the offence under Section 902, Penal Code.

24. The liability of these three accused with respect to the offences made out on account of the injuries inflicted on Meghraj and Atma Ram depends on the interpretation of Section 34, Penal Code, and the determination of the common intention of these accused. Section 34, Penal Code, is in these words:

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.

25. The result essential for the applicability of this section is undoubtedly the existence of a common intention between all the several persons who committed the criminal act, and the 1 next essential is that a criminal act be done in furtherance of that common intention.

26. When these two essentials are satisfied, each of such persons would be liable for the entire criminal act in the same manner as if he alone had done it irrespective of the fact whether he was present at the time or not. Such view was held by their Lordships of the Privy Council in Barendra Kumar Ghosh v. Emperor Their Lordships observed at page 211:

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 part I, because they refer to it.

27. It follows, therefore, that the mere fact that Babu was not present throughout the beating of Meghraj and Atma Ram would not absolve him from the liability of

the consequences of the beating if the actual type of the beating be held to be in furtherance of the common intention of all.

28. The criminal act in the present case will be the entire transaction composed of the abduction and the beating which proceeded from the common intention of all and were so connected with each other as to constitute one transaction. In the aforesaid case their Lordships of the Privy Council observed at p. 217:

In other words, 'a criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.' This means that whatever acts are done by several persons in furtherance of the common intention of all constituted as a whole the particular criminal act for which each person will be liable. All such acts which were either contemplated or were to be done ordinarily in furtherance of that common intention will be included in the criminal act.

29. The common intention in furtherance of which the criminal act is done ought to be determined from such known facts and circumstances which existed before the commencement of the criminal act, as the criminal act itself is committed in furtherance of that common intention. This seems to be clear from the observations of their Lordships of the Privy Council in Mahboob Shah v. Emperor They are:

Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say 'the common intentions of all nor does it say an intention common to all. Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persona in the furtherance of the common intention of all. If this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a prearranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert

pursuant to the prearranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

30. In the present case the only facts which can be helpful in determining the common intention prior to the commission of a criminal act are that all the accused intended to abduct Mt. Prakasho and also intended to give a beating to Meghraj and Atma Ram with a tabal and a lathi. Prom the intention to abduct Mt. Prakasho it must be taken to be a remote wish or intention of the abductors that her husband and husband's brother be killed. Such a remote wish can arise only with a view to be free from any future interference by her husband in the accused's possession of Mt. Prakasho. The use of tabal and lathis as weapons of attack can indicate an intention of giving a good beating. The use of such weapons should impute the knowledge of the likelihood of the causation of injuries which may be simple, grievous or such as be sufficient in the ordinary course of nature to cause death. Knowledge of a likely result has been held in some cases not to amount to an intention to bring about those results and we agree with this view. If the knowledge of a certain result could be said to be equivalent to an intention to bring about that result, there should not have been any occasion to mention both as alternative ingredients in various offences contemplated in the Penal Code. Knowledge of the likely result and the actual result may justify the determination of the intention of the actual doer, but are not the right factors to determine the common intention of others who had made a common cause with the actual doer and whose liability for the actual acts of the doer will be dependent on the question whether the actual acts done were done in furtherance of the common intention of all or not.

31. We are, therefore, of opinion that from the circumstances of this case the common intention of all, namely, Nazir, Sikandar, Babu and Mukkha, can be inferred to be to abduct Mt. Prakasho and to give such a beating to Meghraj and Atma Ram with tabal and lathi as to disable them from successfully obstructing the intended abduction of Mt. Prakasho.

32. We are of opinion that when their common intention extended to give a good beating Ito Meghraj and Atma Ram without any clear conception of the precise nature of injuries which would be caused, they are liable for the offences under sections 307 and 302, Penal Code, in view of the provisions of Section 34, Penal Code.

83. We do not agree with the suggested interpretation of the section to the effect that the common intention must be to commit the offence actually made out. In other words, the; argument is that these accused will not be guilty of an offence under Section 302, Penal Code, unless their common intention was to cause the death of Meghraj, or was such other intention as is mentioned in Section 300, Penal Code.

34. Their Lordships of the Privy Council had no occasion to consider this particular question in Barendra Kumar Ghosh v. Emperor To our mind they had no occasion to determine this question in the second case in Mahboob Shah v. Emperor They have not expressed in any of these cases their opinion that the common intention of all must be to commit the particular offence which is the result of the criminal act. It is clear from their interpretation of the words 'criminal act' in the quotation already made that it is the result of a criminal act which is a criminal offence. Their Lordships stated in Mahboob Shah v. Emperor that the common intention implied a pre-arranged plan. This need not necessarily mean, as urged for the accused, that the prearranged plan must have contemplated the actual offence that would be made out from the conduct of some of the accused or that the prearranged plan must have decided all the minute details of the transaction, such as, in the case of an assault would be the determination beforehand of the exact force to be used and the exact places where blows are to be inflicted. Reference, about the proof of the intention of an individual' in the last portion of the observations already quoted does not lead to any inference that the separate intention of each participator in the criminal act has to be determined. It only deals with the mode of determining the common intention.

35. When by the mere consideration that the criminal act was done in furtherance of the common intention each confederate is deemed to have done the entire act

himself, it should follow that he should also be deemed to have the same intention which the actual doer had in doing that particular act, and which intention is determined from the nature of the act and its consequences. It is thus clear that every confederate becomes guilty of the actual offence which is made out from the acts comprising the criminal acts. It may be repeated that the intention so imputed to such confederates who did not actually commit that particular act leading to the serious consequences need not be the same common intention which existed between all the confederates at the start of the course of conduct which amounted to the criminal act and which resulted in the commission of the offence.

36. There is nothing in Section 34 to suggest that the criminal act is equivalent to an offence which is composed of physical act, its effect and the intention or knowledge in most cases with which the act is done. A person may commit a criminal act and may not commit an offence in view of certain exceptions provided in a penal law. Indian Penal Code speaks of criminal acts in Sections 34 and 38. It speaks of offences in Section 87. It thus itself distinguishes between a criminal. act and an offence. If a criminal act meant an on offence, Section 34 could have been more clearly expressed in terms like 'when a criminal act (offence) commonly intended by all is done by several persons, each of such persons is liable for that offence.'

37. We are of opinion that each of the persons joining in the commission of a criminal act is liable for any such act committed' by any of the persons joining as was done in furtherance of the common intention, and that it is not necessary for the liability of all that they must have the common intention about the exact result which was to follow from the act or about the offence which would be made out on account of the actual physical act and its result We are of this opinion as we consider it practically impossible for any set of people to decide beforehand all the acts which may have to be performed in order to carry out the common intention. Only such acts are not to be deemed to be the acts done in furtherance of the common intention as could not have taken place ordinarily in carrying out of the common intention. Such acts would be mostly unpremeditated ones by some of the persons joining in the criminal act. For such an unpremeditated act of one person, the others cannot be made liable. We see no justification for others to be

not liable for such acts of the other confederates as were likely to be committed in the carrying out of the common intention and which would have been normally foreseen and even contemplated by those persons.

38. In the case of an assault, and we are primarily concerned with such a case at present, it would have been impossible for the assailants to determine beforehand that the blow with a tabal or a lathi should be only with such a force as to caused only simple hurt or grievous hurt or ' such hurt only as would not lead to death. They could have only determined that such and such weapons be used. They could not possibly deter mine the force of the blow or the actual position where the blow would fall. Once they decide to assault another, they should become liable for the actual injuries caused and any other result, which would follow from the assault. We see no good principle why they should be absolved of the liability of a serious offence, even if their primary intention was not to cause that offence.

39. What we have said above, seems to be in accord with the opinion of an American Jurist of high repute and which we reproduce from the case in Emperor v. Barendra Kumar Ghosh.11 A.I.B. 1924 Cal. 257. At page 544 Mukerji J. noted:

Mr. Mayne, in the notes on Section 34, in his edition of the Indian Penal Code, quotes with approval the following passage from Section 439 of the Commentaries on the Criminal Law (1856), by Joel Prentiss Bishop, an American Jurist of high repute:The true view is doubtless as follows : Every man is responsible criminally for what wrong flows directly from his corrupt intentions; but no man, intending wrong, is responsible for an independent act of wrong committed by another. If one person sets in motion the physical power of another person, the former is criminally guilty for its results. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. If he did not contemplate the result in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what might be presumed to have been his understanding of them, he is responsible. But if the wrong done was a fresh and independent wrong springing wholly from the mind of doer, the other is not criminal therein, merely, because,

when it was done, he was intending to be a partaker with the doer in a different wrong. These propositions may not always be applied readily to oases arising, yet they seem to furnish the true rules.

40. The decision of the Court of Criminal Appeal in England in B. v. Betts.(1930) 29 Cox.C.C.259 as quoted in Ratan Lai's Law of Crimes, Edn. 16, page 68, appears to follow these principles. It is noted at page 68:

The Court of Criminal Appeal in England has held that where in pursuance of a common design to commit robbery with violence; one prisoner strikes a blow which results in death, and another is present aiding and abetting the robbery, as a principal in the second degree, both are guilty of murder although the latter may have consented to the use of only a limited degree of violence and the former may have departed from the agreed method of attack.

41. The previous cases of this Court are not consistent on this point. It was not really discussed. Recent decisions seem to indicate the view expressed by us. The first case in which Section 84, Penal Code, came in for interpretation was in Empress v. Dharam Rai.('87) 1887 A.W.N. 236 A person when arrested by constable shouted for help. Three persona came to his help and on the refusal of the constable to release him assaulted the constable and his companions. One of them inflicted one grievous hurt. It was not known who that person was. Mahmood J. observed at page 237:

This change in the law is very significant (the words 'in furtherance of the common intention of all were added to Section 34 in 1870; and it indicates to my mind that the original section having been found to be somewhat imperfectly worded, these additional words were introduced to draw a clear distinction that unpremeditated acts done by a particular individual, and which go beyond the object and intention of the original offence, should not implicate person who takes no part in that particular act

He then quoted the last portion of the opinion of the American Jurist quoted by us above and added that:

This seems to me to be the right interpretation of the words 'in furtherance of the common intention of all' as they occur in Section 34, Penal Code.

He then compares Section 84 with Section 149, Penal Code, and finally observed with respect to the facts of the case:

If there was a common intention it could not have gone beyond rescue, which object did not necessarily involve infliction of grievous hurt. What does appear to me to be patent from the evidence is that upon a hue and cry being raised by Rajwant Rai, these two prisoners came forward to help him to escape arrest. But there is nothing in evidence to show that they intended to inflict grievous hurt or expected that such hurt would be inflicted in furtherance of the object to rescue Rajwant Rai.

He therefore did not apply Section 84 to the facts of the case. He did use the expression when considering of the unpremeditated act which may indicate that the common intention must be with respect to the commission of a particular offence. He has not discussed this point and his other observations do not seem to go against our interpretation of the section.

42. Different views were taken in some cases about the inference with respect to the common intention of the assailants when several of them, less than five in number, attacked another with lathis and caused death. It, however, appears from those cases that it was contemplated that the common intention contemplated in Section 34, Penal Code, should be the common intention to commit the particular offence which was sought to be established against the accused. These cases areDhian Sing v. Emperor ('12) 9 A.L.J. 180 Emperor v. Bhola Singh ('07) 29 All. 282 Emperor v. Kanhai ('13) 35 All. 329 ('13) 35 All. 506 : Emperor v. Ram Newaz ('13) 35 All. 506, Emperor v. Hanuman ('13) 35 All. 560 and Emperor v. Chandan Singh ('18) 40 All. 103

43. In the case reported in Emperor v. Gulab ('18) 40 All. 686 a dispute suddenly arose concerning the cutting of a sugarcane crop. Three men armed with lathis attacked one of the men who was engaged in cutting the crop and beat him so severely that he died, his skull being broken in three places. Tudbal and Abdul

Rauf JJ. held that the accused were guilty of culpable homicide and observed at page 688:

The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death.

44. The case in Emperor v. Irshad Ullah Khan : AIR1933 All528 supports our view, though it dose not discuss the question. In that case Young and Raohhpal Singh JJ, observed at page 616:

What Tufail Ahmad Khan said to Irshad Ullah clearly shows that the common intention was to beat Abdul Majid and his men and to prevent him from irrigating one of the fields leased to him. . When Irshad Ullah Khan fired at Abdul Majid Khan and wounded him, the other three accused made no attempt whatsoever to stop Irshad Ullah Khan from using his gun any further. On the other hand, they themselves started beating the men in the party of Abdul Majid Khan who had come to render help. We believe further that Irshad Ullah Khan was carrying a gun not for the purpose of shooting pigeons (which was the defence story) but to use, if necessary, to stop the irrigation. All the accused must have known that the gun might be used. On these facts we are of opinion that Section 34, Penal Code is clearly applicable to the case of the appellants Nos. 2 to 4.

It appears that the common intention was found to be to beat Abdul Majid and his men and to prevent him from irrigating one of the lielda leased to him. They did not find that the common: intention of the accused was to kill Abdul Majid. They merely found that all the accused must have known that the gun might be used; and applying Section 34, Penal Code, convicted all the accused for murder.

45. The Lahore High Court is of the same view as our Court, though there as been not much consistency in various cases. The Oudh Chief Court, Rangoon, Calcutta and Patna High Courts on the other hand are of the view that the common intention must be to commit the actual crime committed. Some of the cases of these High Courts may be referred to.

46. It appears from the case reported in Sultan v. Emperor 18 A.I.R. 1931 Lah 749 that if there had been a common intention to cause hurt, the several accused would have been guilty of committing murder when one of then in furtherance of that common intention happened to cause the death of the person struck.

47. In Indar Singh v. Emperor 20 A. I. R. 1933 Lah. 819 four persons armed with guns went to a house to commit robbery. The owner of the house was absent. Two of the robbers went with the minor son of the owner to fetch the owner. One of the other robbers stood at the door. Two grown-up sous of the owner came to the house and pushed open the main door whereupon the robber who was standing there fired at them and killed one of them. It was observed at page 817:

In the present instance, the common intention of the culprits was obviously to commit robbery and in furs therance of that intention different acts were committed by different persons. Sardara Singh bad gone to fetch Kishen Singh for carrying out that common intention while Indar Singh shot down Kehr Singh in furtherance of the same. The decision to shoot Kehr. Singh was taken by Indar Singh alone bat there con be no doubt that it was taken in furtherance of the common intention. The object of Indar Singh apparently was to strike terror and disarm all opposition and in this has succeeded; for there was no attempt to offer any effective resistance to the robbers thereafter.

48. These views, though not referred to, are not consistent with the view taken inThakar Singh v. Emperor ('35) 22 A.I.R. 1935 Lah 97 It was held in the case reported in Emperor v. Mujjaffar Sheikh ('40) I.L.R.(1940) 2 Cal. 258 that

In order to make a person constructively liable for murder under Section 34, Penal Code, it must be proved that he had the intention of committing murder in common with the person or persons who actually committed it and who were his companions in the joint criminal act or enterprise.

There is no discussion of the point in the judgment.

49. In Satrughan Patar v. Emperor 6 A.I.R. 1919 Pat 111 it was observed at page 345:

It is obvious that the mere fact a man may think a thing likely to happen is vastly different from his intending that that thing should happen. The latter ingredient is necessary under Section 34, the former by itself is irrelevant to the section, It is only when a Court can with some judicial certitude hold that a particular accused must have preconceived or premeditated the result which ensued, or acted in concert with others in order to bring about that result, that Section 34 may be applied

Reliance was placed on the cases reported in Queen-Empress v. Duma Baidya ('92) 19 Mad. 483 and 29 ALL. 282.'

50.It was held by a Full Bench in Nga E v. Emperor 18 A.I.R. 1931 Bang 1

The common intention referred to in Section 34, I.P.C., is an intention to commit the crime actually committed and each accused person can be convicted of that crime only if he has participated in that common intention.' This appears to be the majority view on a consideration of various cases.

51. In the Full Bench case in Emperor v. Nga Aung Thein.22 A.I.R.1935 Rang. 89 the question referred to the Full Bench was:

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 34,1. P.C., when there is no evidence to show that they committed any further act which would render them directly liable as abettors

No direct answer to the question was given. Page C.J. and Mya Bu J. seem to have approved of the cases reported in Emperor v. Barendra Kumar Ghosh : AIR1924 Cal257 Barendra Kumar Ghosh v. Emperor Nga E v. Emperor 18 A.I.R. 1931 Bang 1 Nga Po Kyone v. Emperor ('33) 11 Bang. 354 Emperor v. Irshad Ullah Khan : AIR1933 All528 and the observations of Richardson Emperor v. Barendra Kumar Ghosh : AIR1924 Cal257 to the following effect:

A common intention to carry out an unlawful design at all costs, even at the cost of overcoming resistance, or evading capture by taking life, is sufficient. Without

mincing matters the presumption 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 fire arms, and fire arms have been used with fatal effect.

Their attention seems to have been chiefly drawn to the question whether in the circumstances set out in the question, common intention to murder, if necessary; can be drawn or not. They were not deciding the question whether the common intention contemplated in Section 34, Penal Code, was the common intention to commit the actual offence committed. We have already referred to the Allahabad case and noted that there the finding was not that the common intention was to kill and yet all the accused were convicted of committing murder.

52. iaul Hasan and Yorke JJ., held in the case in Baja Ram v. Emperor ('39) 14 Luck 328, that the common intention referred to in Section 34 was an intention to commit the crime which was actually committed. They referred to the case in Nga Tha Aye v. Emperor ('35) 22 A.I.R. 1935 Bang. 299 and to the case in Nga E v. Emperor 18 A.I.R. 1931 Bang 1 They also referred to the observations of Mahmood J. in Empress v. Dharam Rai ('87) 1887 A.W.N. 236

53. Ziaul Hasan and Yorke JJ., expressed the same view again in Zahid Khan v. Emperor ('39) 14 Luck. 378 We feel it difficult to follow the reasoning behind the determination that the common intention of certain assailants was to cause grievous hurt and not to cause any more serious effect like causing death, once the assailants decided to cause hurt. In fact, we are of opinion that it is difficult to imagine people determining beforehand that they would cause nothing more than grievous hurt.

54. In Sundar Singh v. Emperor 26 A.I.R. 1939 Oudh. 207 Hamilton J., held that for the application of Section 34, Penal Code, the intention, if any, of the actual person who caused death should be shared by others.

55. We do not see why the intention which is to be imputed to the actual, person who deals the fatal blow and which intention is mostly to be gathered from his actual conduct, should then be looked into in the other persons who had joined

him in the incident. Such a reasoning appears to us to be the reverse of what Section 34, Penal Code, requires. We have to see what was the common intention before a person has commenced the criminal act. It may be that to determine such a common intention we may not have the direct evidence of what passed between them before the commencement of the transaction and have to conclude that intention from their conduct. If so, the conduct of all such persons has to be looked into. If the intention of the actual doer of the fatal act is to be determined from his conduct alone, the intention of the others will normally be gathered from their respective conduct, and as they did not do the fatal act, their intentions will not ordinarily be determined to be the same as the intention of the actual doer of the fatal act. We have to determine the original common intention and then to see whether the actual doer of the fatal act acted in furtherance of that intention or acted quite suddenly and beyond the common intention. We have not to see the intention behind the commission of the fatal act only which alone is not the criminal act in view of what their Lordships of the Privy Council held in Barendra Kumar Ghosh v. Emperor , and surely the fatal act alone is not equivalent to the offence whose ingredients include the physical act, its consequence and the intention or knowledge with which the physical act was performed. In our opinion, Section 84 refers to a physical act only. Of course the physical act contemplated should be criminal, that is, should be what is considered a crime, which is not defined in the Code and should mean a thing which ought not to be done and which affects the State in addition to the individual against whom the act is done.

56. We, therefore, hold that Nazir, Sikandar and Babu have been rightly convicted of the offences under Sections 302 and 307 read with Section 84, Penal Code.

57. Nazir and Sikandar have been sentenced to death under Section 302, Penal Code. In the circumstances of this case we are of opinion that the lesser penalty of law will sufficiently meet the ends of justice.

58. We, therefore, dismiss the appeal of Babu.

59. We dismiss the appeals of Nazir and Sikandar and confirm their conviction, but modify the sentence under Section 302, Penal Code, to the effect that we substitute a sentence of transportation for life in place of the sentence of death

and direct that all the sentences against them will run concurrently.

60. We allow the appeals of Mam and Abdul Latif against their convictions under Section 366, 6368 and 411, Penal Code, respectively, set aside their convictions and order that, if in custody, they will be released forthwith if not required to be detained under any other process of law.

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