

In Re: Lachman Nanda

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Court : Madhya Pradesh

Decided On : Apr-15-1963

Reported in : AIR1966MP261; 1966CriLJ1012

Judge : H.R. Krishnan and ;S.B. Sen, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 234 to 239 and 537; [Evidence Act, 1872](#) - Sections 32; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 149 and 302; [Constitution of India](#) - Article141

Appeal No. : Criminal Ref No. 3 of 1963 and Criminal Appeal Nos. 41 and 42 of 1963

Appellant : In Re: Lachman Nanda

Advocate for Def. : Balwant Singh, Govt. Adv.

Advocate for Pet/Ap. : K.A. Chitle, Adv.

Judgement :

Krishnan, J.

1. The two appeals relate to the same matter as the death reference, one memorandum being sent from jail and the other filed by counsel in Court. The appellant had been put on trial along with two others--his brother-in-law, Kaluji Gujar, and his nephew, Samandar Gujar son of Kaluji--under different sections

including 302, 302 read with 34 and 452 I. P. C. the allegation being that the present appellant, condemned man, trespassed into the house in which Amarji was resting, and killed him by hitting him on the head several times with a weapon that has been described as 'pasliwali lohangi' and causing a number of incised wounds including one which fractured the skull and damaged the brain. This is said to have happened at about 2.00 p.m., on 7-11-1902 when Amarji had come to his brother Balaji's house after an earlier incident at the fields between half and one mile away, where Kaluji and his son are said to have hit him with lathis. They were all jointly committed as the enquiring magistrate felt that the two incidents, namely the attack with lathis by Kaluji and his son at the fields and the latter attack by the appellant Lachhman with a pasliwali lohangi at Balaji's house were part of the same transaction. The learned Sessions Judge himself after rejecting a prayer for the splitting up of the case into two--one against Kaluji and Samandar and the second against the present appellant framed a formal charge under Section 302 with 34 against all the three. Finally however, he acquitted Kaluji and Samandar of the charge of murder as there was no common intention and convicted them for causing simple hurt. They have not appealed. The present appellant he has convicted under Section 302 I.P.C. and sentenced him to be hanged subject to confirmation by the High Court. He has also convicted him under section 462 and sentenced him to rigorous imprisonment for two years which sentence is to take effect in case the death sentence is set aside and concurrently with any other substantive sentence he might be awarded.

2. This appeal is of Interest on several grounds, in particular, the legality and effect of the joint trial before the Sessions Judge of all the three; the peculiar problems raised by the nature of the injuries on Amarji and the medical evidence before the Sessions Court; and Anally, the propriety of the capital sentence, the last in view of the learned Sessions Judge's assumption that in some other case a direction has been given by the High Court which was binding on him, that in cases like the instant one, the death penalty should be awarded.

3. The facts of the case are simple. Between the present appellant on the one side and Amarji and his brother on the other, there had been quarrels in the past centering round their conflicting claims to cut and remove the grass from a seda or

strip of land intervening between their respective fields. Between Kaluji and Amarji also there was a difference exactly of the same nature though it is not clear if the Seda concerned is different in the two disputes or whether it is the same, Kaluji and Lachman making a common cause against Amarji because of their close relationship. From time to time there had been reports to the police; but two events are worth mention on 2-8-1062 there was a quarrel between Lachman Gujar on the one side and Amarji and Balaji on the other about the cutting of the grass on the seda; in course of the quarrel it was alleged that both the brothers used force, Amarji actually hitting Lachman with a farsi injuring him and also cutting away the toes of a young child which Lachman was holding in his arms at that time. A case under Section 326 I. P. C. started in this connection was still pending on 7-11-1962 when the present more serious incident took place. It seems there was also a case under Section 107 Criminal Procedure Code soon after started at the instance of Amarji, against Lachman as well as Kaluji.

4. On the date of this incident, that is, 7-11-1962, sometime about mid-day Amarji on the one side and Kaluji and Samandar on the other came to blows at the seda between their fields at a distance between half and three-quarters of a mile from the village. If we take the evidence of the eye-witness to that incident, the appellant was not in it or as for that matter anywhere nearabout. Amarji came back his mother accompanying him. but himself walking all the way till they reached the house of Balaji--his brother. His own house is contiguous and the impression created is that both of them live in portions of what used to be one single house. He had only been beaten with lathis at the field; still he was in need of rest. His mother left him in the house and went into the village to bring a bullock-cart for reaching him to the thana.

5. But before she could return, there was another incident. Now it is said by four witnesses who will be named in time and the deceased himself who gave a dying declaration that while he was resting in Balaji's house, the present appellant Lachman came there carrying what has been described as a pasliwall lohangi. As the nature of the weapon has been the subject matter of discussion in the lower court, it will be described in time--both generally and with reference to the specimen that has been produced in the Court and was found to be smeared with

blood, the prosecution case being that it had been recovered from an out house or cattleshed of Lachhman. He entered Balaji's house seeing which Amarji who guessed that the new-comer did not mean well, walked out; but the appellant caught up with him within a few paces outside and hit him several times on the head with the weapon already named. Then the assailant ran away while Amarji himself who had fallen on the ground a few paces outside Balaji's house came back into it probably creeping, though two witnesses have said he walked indoors; anyway, the distance was 5 or 6 paces. Soon after the villagers collected and the deceased who was by then in a condition to speak stated to them. Including the choukidar, how Lachhman had come into the house and how he had attacked him. Thereafter the injured man was removed to the thana but by the time he arrived he died. There was the usual post mortem examination which showed that Amarji had seven injuries on the head all of which were incised wounds caused by some weapon, that at any rate was not quite blunt, and including two comparatively more serious Injuries Nos. 5 and 6 on the list of the medical witness, which will be described presently. Out of them again, the former No. 5 was quite serious and by itself sufficient in ordinary course of nature to lead to death. In addition, he had five more injuries elsewhere on the body those being blunt weapon injuries which painful as they might have been, could not seriously disable and were almost certainly the results of lathi blows. The prayers of the three accused persons for separate trials were negatived and the case proceeded in the Sessions Court jointly against them on a charge under Section 34 as well. The cross-examination was by the same counsel so that the chances of two batches of the accused throwing the blame on each other were much reduced. The Court found Kalu and Samandar responsible only for the simple injuries by lathis given during the earlier occurrence in the fields. Accordingly, they were let off with a mild sentence under Section 328 I.P.C. from which they have not appealed. Lachhman, however, was held responsible for the injuries on the head including the fatal one and convicted under Section 302 I.P.C.

6. The first ground upon which considerable emphasis has been placed is that the joint trial of the three accused persons was illegal, because the two incidents did not form part of a single transaction. The prayer therefore, was for a retrial of the present appellant with reference to the allegations made in regard to the incident

at Balajis' house. This is to state the problem far too simply. Actually, the question could be one of prejudice rather than of compliance with or violation of a mandatory provision. Even assuming that it would have been advisable in the circumstances like those of the present case to have separate trials, now there having been a joint trial, and two of the accused persons having got off with lighter sentences, it has to be seen whether there is justification for reopening the entire matter and ordering a retrial, if not of all the three, at least of the present appellant. The case for joint trial is contained both in the concluding portion of the commitment order and also in the charge framed by the learned Sessions Judge under Section 34. The committing magistrate himself has not framed charge under that section but he has clearly described the transaction as one. In the Sessions Court the occasion for amending the charge came after the disposal of the petition by the accused persons for splitting up the case; but then it was purely a matter of coincidence. That petition was moved foremost in the Sessions Court and in any event the amendment of the charge would have come later. Both the committing magistrate and the Sessions Judge were impressed with the fact that there had been some sort of association on previous occasions between the present appellant on the one hand and Kaluji on the other. For one thing, they are closely inter related; for another their original grievance against Amarji Gujar and his brother was similar if not identical. There was some *seda* between [the fields and each party claimed that he had the exclusive right of collecting the grass that grew on it. We do not even know whether Kaluji and Lachhman had separate pieces of land both contiguous to the land of Amarji of these two persons were referring to the same land by the contiguity with which they claimed the grass on the *seda*. It also appears that in the proceedings under Section 107 Criminal Procedure Code. Lachhman and Kaluji were put on the same side. In the evidence in this case itself one or two witnesses have tried to make out in Sessions Court that Lachhman was also at hand during the incident at the fields. But this was not their statement during the earlier stages so that it would be safe to assume that Lachhman's physical presence during the earlier part of the happening when Kaluji and his son beat Amarji has not been established and was not even thought of to begin with. In these circumstances it can be said that on the one hand, the initial impression of the Court that the whole thing was one transaction and there was something like

common intention cannot be called altogether baseless; and on the other, that the evidence did not support it. The question is not whether in the final judgment there is a justification for a joint trial, but whether on the prima facie case the Court could have felt that there is something like unity of purpose running through the entire course of events. Looked at that way the joint trial has not offended against any principle of law.

7. At the same time, separate trials might have been more convenient, and actually the accused requested the same at the earliest stages. It was quite conceivable that learning of the mishap to his old enemy at the hands of Kaluji and his son, Lachhman thought that it was time for him to pay off scores, and that independently and without any consultation or arrangement with Kaluji. In this, as on most questions of convenience and prudence, no cast iron rule can be laid down and Courts should be guided by their notions of fair-play, with sympathy towards the accused charged of serious offences. It will be fair to accede to a request for separate trials, if the accused wants it early and there is no ulterior purpose, and no disproportionately excessive loss of public time.

8. The issue having been raised, it is worth examining the question even on the assumption that this joint trial does not come under Section 239 (d) Criminal Procedure Code. The problem before us is, if the breach of the requirements of Section 288 Criminal Procedure Code which makes separate trial the rule and the application of Section 239 the exception, by itself entitles the accused person to demand a fresh separate trial or whether he has in addition to show prejudice, that is, that the breach has occasioned a failure of justice. It has been strenuously urged at the bar on behalf of the appellant that we are dealing with a mandatory provision and no question arises of prejudice as popularly understood.

9. Whatever the legal position might have been before the enactment of Sub-section (b). In Section 537 Criminal Procedure Code, it is clear that after the joint trial of persons who should strictly speaking have been separately tried is not in itself a ground for a fresh separate trial, unless the error has occasioned a failure of justice. That sub-section runs : --

' No finding, sentence shall be reversed or altered on appeal or revision on account

(b) of any error, omission, irregularity in the charge including any misjoinder of charges '

We are not inclined to agree with the contention that the misjoinder of charges means only the improperly charging of the same person or persons with more than one offence; in our view this means also misjoinder of more than one person for the same offence or more than one offence. In this connection it would be convenient to use the two words 'charge' and 'offence' more distinctly than has been the usual practice. The word 'charge' is wider in purport and includes, beside the element of offence, the reference to the person who is alleged to have committed it. Thus, a misjoinder of charges means the misjoinder either of the offences or of the persons alleged to have committed the offences. To hold that it refers only to the misjoinder of the first, would be to unnecessarily narrow the purport and effect of the section. This view receives support from the following rulings: *Ramkishan v. State*, AIR 1966 All 462; *Ramkrishna Panisker v. State*, AIR 1959 Ker 372; *Birichh Buian v. State*, AIR 1961 Pat 256. In the first of these the Allahabad High Court held:

'It cannot be said that Section 537 is applicable only to misjoinder of offences and not to misjoinder of both offences and accused persons. The words used in Section 537 are not misjoinder of offences or accused persons. They are misjoinder of charges. These words clearly include misjoinder of offences or of accused persons.'

In the Kerala case, AIR 1959 Ker 372 (supra) It was held: as there was no prejudice to the accused or a failure of justice occasioned by the so called misjoinder of charges or persons, Clause (b) of Section 587 was a complete answer to the objection that the alleged misjoinder vitiated the trial.'

Similarly, in the Patna case AIR 1961 Pat 856 (supra) it was observed:

'The true 'effect and scope of Clause (b) of Section 587, must be held to be that mis-joinder of charges, including misjoinder of offences and persons, is curable under Section 537 and a finding, sentence or order of a competent court cannot be reversed or altered on the ground of such misjoinder unless it has, in fact, occasioned a failure of justice. The decisions in which it was held before the amendment that misjoinder of charges constituted Illegality which vitiated the trial have, therefore, been superseded, and the principles laid down in them have ceased to be good law "

10. In this connection the remarks of the Supreme Court in Willie (William) Slaney v. State of Madhya Pradesh. (S) AIR 1956 SC 116 and in the more recent case reported in Kadiri Kunhahammad v. State of Madras. AIR 1960 SC 661 are helpful. The former case had been tried at a time before the amendment introducing the present Sub-section (b) of Section 687 and there is a precaution prefacing the remarks concerned. Still, the trend is that the words 'misjoinder of charges' are wide enough to include two kinds of mis-joinder, the first, of offences against the same person, and the second, of different persons being jointly tried for one or more offences. In the later case it was pointed out that the joint trial would be justified if to begin with the Court is satisfied that the offences by different persons appear to have been committed in course of the same transaction though it may turn out when the trial is concluded that the happening was not really the same transaction. It was further pointed out that in view of the wording of Section 587, the breach of every provision of the Code does not necessarily make the trial invalid.

'If the criminal trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 587, and none the less so because the irregularity involves as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code.'

For these reasons, we would hold that even if the joint trial of the three was not strictly in terms of Section 233, that by itself does not render the trial invalid.

11. The evidence in regard to the occurrence at the field comes from one set of witnesses who say nothing about the happening at Balaji's house. Similarly, the later happening is evidenced by four eye-witnesses who do not say anything about the earlier incidents. The accused persons, the two directly held responsible for the happening at the field and the one for the happening at Balaji's house, were separately and clearly confronted with allegations that did not in the least manner overlap. In these circumstances, there was absolutely no confusion or bewilderment caused to any of them. At the same time there is one aspect of the defence in the lower court which calls for mention. The allegations were kept separate and for the most part the cross-examination in their regard was also distinct. But all the three were represented by one lawyer so that he was presumably prevented from acting on behalf of either of the batches throwing the entire blame on the other, which was theoretically conceivable if they had been represented by different counsel. But this in-ability to follow a particular technic of defence had nothing to do with the presentation of the evidence by the prosecution. Obviously, it cannot be called prejudice. In the result, therefore, we find that there is no ground for retrial in any view of the matter

12. This takes us to a consideration of the evidence of the four witnesses who actually saw the appellant hitting Amarji on the head with the weapon already mentioned and also of the witnesses like the choukidar, Danna, and Amarji's mother, who were called to the scene after the happening and heard either from the wounded man or from the witnesses about the attack. As already noted, the place where Amarji had returned to rest and was alone at that time, is his brother Balaji's house between half and one mile from the scene of the first beating. It is of significance that Amarji walked, may be with some difficulty and with some help from his mother, but walked all the same, on his own legs and was not carried. While he was alone, the appellant came there armed with the pasliwali lohangi. Nearby were two boys about 13 and 15 years of age respectively. Amir P.W. 7 and Sardar P.W.-9 looking after their cattle. In addition, there was Onkar Chamar P.W. 10 and Shri-ram P.W., 13, both of whom are local residents and undoubtedly happened to be there, the latter actually looking up an immediate neighbour of Amarji Rama Chamar by name. All the four have given a broadly consistent account of the arrival of Lachhman with the weapon and his altercation with

Amarji, the latter's attempt to get away and his being attacked and falling down and moving back into the house. They ran here and there to call the other villagers and did succeed in bringing several neighbours and showing them the blood marks outside the house and the wounded man just inside with bleeding injuries on the head. None of them has got any interest in the squabbles among these Gujars, and had not on any earlier occasion taken sides or shown sympathies. As usual, some contradictions and omissions have been brought out which are of no practical significance. For example, the defence has shown the failure of the two cowboys to mention in their police statements the words and language used by Lachhman before the beating and again, their statement on one occasion that Lachhman came carrying a child in his arms whom he left in his house and on the other, the child was accompanying him on foot. This is typical of the alleged contradictions and variations and need not be discussed at any length. All the four witnesses give a clear and full picture and considering that they were within very short distance which they indicate is round about 20 paces, a mistake either in regard to the identity of the assailant or in regard to the broad course of events is out of the question.

13. Soon after, Dhanna and the wounded man's mother arrived at the scene accompanied or closely followed by the chokidar. The latter states and has been stating from the very earliest stage in the first information report that-

'I and Dhanna went to Amarji's house where he was lying with wounds on his head and legs and his clothes full of blood. Dhanna and I asked Amarji 'Who has beaten you?', whereupon he replied. 'In the jungle Kaluji and Samandar hit me with sticks and when I had reached the house Lachhman entered and hit me with a lohngi.'

This is a dying declaration and though the case by no means depends upon this fact or the correctness of Amarji's statement, this has been the subject matter of discussion in view of the medical evidence which shall be considered presently. But apart from it, the statement of the four witnesses leaves it altogether beyond doubt that Lachhman entered the house of Balaji followed Amarji out of it and hit him several times on the head with the weapon about which also something more is to be said.

14. The witnesses describe the weapon as identical with (or similar to) the one produced in Court which had been recovered from his cattle-shed hidden under the heap of cow-dung cakes as a result of the information given by Lachhman himself to the police while in their custody. On chemical and serological examination it was found to have stains of human blood on the iron blades fixed at one end. The evidence is quite convincing in regard to the discovery, but one discrepancy has been pointed out. Whereas Lachhman said that he had kept the weapon at his house by which he presumably meant the living rooms, he actually took the officer and panchas to a separate structure usually used as a cattle-shed and took out of where it had been hidden the weapon with the blood stains. This discrepancy is immaterial and may even be only the result of a manner of speaking. The point to note is that Lachhman stated of himself having kept the weapon; whether it was this or that part of the house, it was to the cattle shed that he took the party.

15. The weapon is a thick stick or lathi of usual length with metal bands here and there. One with such bands is known as lohangi and is certainly more effective as a weapon of offence because the bands hold the lathi together and if the metal portion comes into contact, especially with a bony part of the body, the injury caused is more serious than by a smooth lathi. The weapon is sometimes made more effective by pushing in at one end a number of blades as it were, radiating like spokes in which case it is sometimes called 'pasliwali lohangi'; each projecting blade in this weapon is only about half-an-inch or less in width, and though it is not sharp like a knife, the mark it can produce will be sharper than if the surface was smooth or there was only a roundish metal band. The peculiarity of this particular weapon is that the blades are not distributed in all directions on one side equal to nearly half the circle there are no blades. Either the old ones had fallen off or to begin with the blades were all stuck on one half alone. Again, they are not sharp in the sense a knife or a spear is sharp; but they are sharp in comparison with the surface of a lathi or lohangi. There are 7 injuries on the head all of which have been described as 'incised wounds', in other words, ones where the skin-cut has sharp regular edges. This happens quite often even when a blunt weapon hits a part of the body where there is very little flesh between the skin and bone. When there is flesh, any real sharpness of the edge is unmistakably brought out by a cut

into it, whereas, when the weapon is blunt the flesh is squeezed or hashed without any real cut into it. Where the edge is particularly sharp then the bulbs at the hair-roots might be cut which cannot happen with a blunt or a semi-sharp weapon even though the skin might show sharp edges.

16. In the light of these well known facts, the argument in the instant case has been directed towards questioning whether the weapon with which Amarji was hit on the head did at all have a sharp edge. It is pointed out that the medical witness did not examine whether any hair-roots or bulbs had been cut through. There was also no definite observation about the cut into the flesh which in any event would not be conclusive in that part of the body. As for the hair-roots, with a weapon of the nature produced in Court, any cutting of them was out of question. It is sharp only in comparison with a lathi while it is blunt very blunt in comparison of a knife or spear or a farsi. All that need be said at this stage is that every one of the 7 injuries above the neck are such as could be received when one of the blades of this weapon comes in contact with that part of the body. The absence of parallel injuries is explained by the discontinuity in the distribution of the blades themselves. On the other hand, not one of the injuries elsewhere on the body could have come from this weapon. The conclusion is that the head injuries were all received when the man was hit with this weapon, and the other Injuries had been received else where when he was hit with really smooth surfaced blunt weapons.

17. Though every injury above the neck is grievous in the sense it endangers life, those numbered 5 and 6 in the instant case call for special notice:

'5. Incised wound $2\frac{1}{4}$ ' x 1' x $1\frac{1}{2}$ ' on left parietal, Horizontal with fracture on parietal bone, membrane and brain injured.

6. Incised wound 3' x $1\frac{1}{2}$ ' x 1' on right parieto-occipital region with fracture of corresponding bone '

Injury No. 6 though serious did not get down into the brain; the Immediate cause of death therefore was injury No. 6, this being an objective fact without any reference either to the identity of the assailant or the circumstances of the attack. It is

significant that this injury is located precisely on that spot where in the vast majority of cases, that is of 'right handed person', the speech centres are situated. If in this case we were called upon to decide as a crucial issue whether the injured man could have spoken immediately or soon after the attack, we would have to consider the possibility, firstly, of a general shock reducing the victim to unconsciousness or even continued unconsciousness in a sort of coma, and secondly, damage to the speech centres which would at all events makes speech impossible even after he recovered general consciousness. But a general shock does pass off and the victim improves after a short while, which naturally varies from case to case; after it he again sinks slowly as a result of the continued effects of the injury. Therefore, if there was no damage to the speech centres there is nothing improbable in the injured man having spoken to the chokudar and Dhanna, not immediately after the attack, but say, after a short while may he, 15 minutes or half-an-hour.

18. The point to note is that the chokidar at all events has altogether no motive to attribute a statement to the injured man if he did not make any; for another, the prosecution case does not at all depend upon the dying declaration made to the chokidar and is just as good or bad, after eliminating it. As a fact, we note that there is nothing to exclude the possibility or even the probability of such a statement. If the dead man had been right-handed, then certainly he could not have spoken because the speech centres of the brain had been damaged; but quite a number of people are left-handed, in which case, the speech centres are located just on the opposite, that is, the right side of the brain. In the instant case a witness (not a member of the family) has been asked whether Amarji did not use his right hand for certain work and he states that he did. But it is difficult to see what such an observation leads to at all. Even those who remain conspicuously left-handed all through their lives use their right hand also for certain purposes, the only difference being that the left comes more easily, especially, when reflex action is taken. Another complication is that persons born left-handed do quite often and may be, by imitative effort, become apparently right-handed, in which case, the speech centres still stay on on the right side. It is only those who have known a person for a number of years, especially, from childhood that can give a definite opinion whether he was really left-handed. Thus, the fact of the injuries

being on the speech centres on the left side does not also exclude the possibility of his speaking to the chouldar, there being no definite evidence that Amarji was really right-handed in the proper sense of the term. When all is said and done, the dying declaration is not by any means so important for the purpose of the prosecution because apart from it we have the evidence of four eye-witnesses that it was the appellant that entered the house and attacked Amarji.

19. If the head injuries, especially the one already described under No. 5, was the result of the attack there is no doubt that Lachhman is guilty under Section 302 I.P.C. It is not a single blow with a weapon which is not generally found to be deadly, but a repetition of blows with a weapon strengthened with metal bands and blades so as to be quite effective

20. One of the ingenious arguments made at the bar is that even on the assumption that Lachhman attacked Amarji at his house. It is by no means certain that the fatal injury was inflicted by him and had not been inflicted earlier by Kaluji or his son. Support for this argument is sought to be derived from the statement of the injured man's mother Surajbai P.W 21 and friend or relation Dhanna P.W. 22 both of whom state that even when he left the fields. Amarji had bleeding injuries on the head. If Amarji did receive bleeding injuries on his head at the field, it is urged that it was at least likely that the one numbered 6 had already been received and whatever harm Lachhman might have done at the house it was not a fatal attack. But this argument does not appeal to us. Neither Dhanna nor Surajbai actually saw the attack at the field. They came later on. As Kaluji and Samandar are not appellants here, we have found it unnecessary to examine at length the statements of eye-witnesses Bhanwar P.W 5 and Lala P.W. 6 to the happening at the field: but it emerges clearly from their statement that there was no injury on the head and none at all anywhere on the body by a weapon with something like an edge, whether sharp or semisharp

21. Most important is the undoubted fact that Amarji came back walking from the field to Balaji's house, a distance not less than half-a-mile and if anything, nearer to one mile. If he had received any injury like Nos. 6 or 6, it was physically impossible for Mm to walk that distance, to be sure, the four eye-witnesses to the

incident at the house have spoken of his getting hack into the house from the frontage a few paces off even after receiving the injuries, they being vague whether he crawled back or tottered or stood up and walked in, the last being the least probable. But it is one thing for a person with such an injury to get over a few paces which is sometimes done unconsciously by a wounded man and (mite another thing for him to walk a distance. From the field to the house ho was not carried by anybody and even if he had leaned upon his mother while walking, there was a conscious process which was altogether impossible with either of these two injuries. Thus, one has to put down as mere exaggeration or a mistake, a natural one resulting from a mix up of the subsequent impressions with the earlier ones, on the part of Dhanna and Surajbai when they state that even after the incident at the field Amarji had bleeding wounds on the head. There is no third alternative. If after going from the field Lachhman attacked him and if immediately after that attack the injury No 5 was found on the head there is altogether no doubt that it was a result of Lachman's attack and not the earlier attack by Kaluji and Samandar. Independent corroboration of this is found in the nature of the weapon. Thus we have to find as a fact that Lachhman trespassed into the house of Balaji and caused the head injuries including the fatal one numbered 5 in the medical report. As this injury was one certain to result in death, in due course of nature, and the assailant had every reason to know of this, from the nature of the weapon, the part of the body aimed at and the repetition of the blows he has been rightly convicted under Section 302 I.P.C.

22. While awarding the sentence, the learned Sessions Judge has in paragraph 68 of the judgment thought fit to give special reasons why he feels obliged to award the extreme penalty. Most often the reasoning if any recorded is just the opposite why the Sessions Judge in spite of the apparent cruelty or deliberateness of the murderous attack chooses not to award the extreme penalty. In the instant case the Sessions Judge writes.

'The Court really feels a great mental agony to award the extreme penalty as it is on occasion for more than one this Court was compelled to award the extreme penalty, but following the directions given by his Lordship Krishnan J., in the famous Rangwasa murder case from Indore District, which is absolutely binding

on this Court, as a law, the extreme penalty i.e.. death for the offence of murder of Amarji, has got to be awarded to accused Lachhman '

He has probably considered necessary to mention the name of the individual Judge because there were two judgments to the same effect. The judgment referred to does not seem to have been published; but presumably the learned Sessions Judge had a copy before him. We have gone through the judgment with special reference to the discussion as to the appropriateness or otherwise of the extreme penalty in that case, which was one of murder by a large number of people setting on a single person and inflicting several dozens of injuries. There is altogether nothing in the judgment which can be understood as a direction whether in general that the death penalty should be awarded or in particular, in circumstances comparable to the present one. What came up for discussion was the passage in the Sessions Court's judgment that though the murder was very cruel, the punishment has to be softened in view of the fact that the murdered man was 'strong and stout' and was guilty of 'nefarious doings'. It was pointed out that none of the doings suggested or proved in the evidence was real nefarious or was one that justified the comments of the Sessions Judge. So, there is no such direction and the Sessions Judge's first instinct, to award the lesser penalty might as well be followed by us. There is broadly some extenuation in the fact of the attack by the dead man a few months before. In which he is said to have inflicted injuries; not only was Lachhman himself injured, but also a child whom he was carrying and whose low had been cut off. So, the death sentence is set aside and imprisonment for life substituted in its stead. The conviction under Section 308 I.P.C is upheld; but the death reference is rejected. The conviction and sentence under Section 452 I.P.C are also maintained; but the latter shall run concurrent with the life sentence. Subject to the modification in the sentence under Section 302 T P. C. the appeal is dismissed

Sen, J.

23. I agree with my learned brother that conviction of appellant under Section 302 should be maintained. I also agree that sentence of death should be set aside and instead he should be sentenced to imprisonment for life. Conviction and sentence

under Section 452 are also proper.

24. In spite of my agreeing with my learned brother about the guilt of the appellant I am constrained to add a few words as I do not agree with my learned brother about the interpretation of Section 537 Cri. Pro. Code.

25. There cannot be any doubt that joint trial was justified

26. The prosecution alleges that the offences were committed in the course of same transaction and that is sufficient for a joint trial. In this case it was alleged that the two incidents had a causal connection. The attack on the deceased might have been made at different times and at different places. Even then the transactions might be one. The case may fail for want of proper evidence, or even for wrong assumption of facts or wrong inferences on facts arrived at by the investigating department. But that is not what we have to consider at the beginning of trial. If the investigating department considered from certain set of facts that the transactions were continuous or same, it will suffice for the purpose of joint trial unless it is alleged accusations were with ulterior motive.

27. The facts of the case indicated that on 7-11-1962 about mid-day Amarji deceased had a quarrel with Kaluji and Samandar. Amarji was assaulted very badly though he could come to his own house. He was resting in Balaji's house when Lachman, the present appellant came there and saying that he was finishing the unfinished acts, hit Amarji at several places with a Farsiwali Lohangi he had brought. The other facts are not necessary for me to describe. What I mean is from the facts which the prosecution gave in the beginning a joint trial was justified.

28. It is also pertinent to note that the committing Magistrate himself thought that incidents apparently looking independent were in the course of the same transactions. The Sessions Judge went further and thought that under the circumstances a charge under Section 34 would also be justified and after framing the charge accordingly he tried all the three persons Kaluji, Lachman and Samandar jointly.

29. I, therefore, do not see any defect in the trial and this is a fit case where Section 239 (d) would be easily applied. To bring a case under Section 239 (d) it is not necessary that there should be a common intention of all the accused being tried jointly or there should be circumstances which would make them liable under Section 149. It is sufficient if the accusation shows that the persons accused of different offences committed them in the course of same transaction. Sameness of transaction is different from the common intention or the common object and there should be accusation only that the offences were committed in the course of the same transaction.

30. But I am afraid I cannot agree with the interpretation put forth by my learned brother regarding Section 537 (b) Cri. Pro. Code. Mis-joinder of charges can only be in respect of charges. A charge has not been defined in the Code but the charge is distinct from the person accused of the charge. Mis-joinder of charges cannot therefore mean joinder of accused persons charged of an offence. It can only mean different charges joined together against the provisions of law that is, the charges which are of different kinds and which cannot be joined together under the procedure prescribed in the Code from Section 284 to Section 289.

31. It should be noted that Clause (b) of Section 687 mentions the irregularities which are curable. This must be either error or omission or irregularity in the charge. While 'mis joinder of charges' is included in the defects specially mentioned, the subsequent words are 'including any mis joinder of charges'. It should therefore be ejusdem generis. The defect must be of the type of error, omission or irregularity in the charge.

32. With due respect I cannot agree with the observations made in AIR 1956 All 462. The words used in section 637 are not mis joinder of offence of accused persons. They are misjoinder of charges. If really mis-joinder of charges included both accused persons and offences then there was no reason why legislature should not have used those words by amending the same, expressing clearly that Section 537 Cri. Pro. Code would cure a joint trial of accused charged in course of different transactions

33. The observations of their Lordships of the Supreme Court (S) AIR 1956 SC 116 were referred to by the Allahabad High Court. In coming to their view that Section 537 would cure such trial. Apart from the caution their Lordships of the Supreme Court have laid down that they were not going to decide the matter, the observations do not go to the length of saying that such a trial as we find in this case would be cured under Section 537 Cri. Pro. Code as amended. In that case Bose J. who wrote for himself and on behalf of S.R. Das Actg. C.J has observed :--

'It is possible (though we need not decide in this case) that the recent amendment to Section 537 in the Code of Criminal Procedure (Amendment) Act of XXVI of 1955, where mis-joinder of charges has been placed in the curable category will set at rest the controversy that has raged round the true meaning of (1902) 28 Ind App 267 (PC). In any case, our opinion is that the real object of the Code is to leave these matters to the discretion and vigilance of the Court. '

What their Lordships suggested was that it was possible to hold that the dispute centering round the interpretation would be set at rest. They categorically said that they did not want to decide the same.

34. The short question is if we hold that Lachman committed an offence of murder independently of any connection with the offence committed by Kaluji Gujar and his nephew Samandar Gujar, whether he would be tried with them. What I am considering is, in a case in which the transaction is not the same and if persons accused of different offences do not commit the same in the course of the same transaction and are tried jointly, whether Section 587 (b) would cure the defect.

35. As already seen from the passage already quoted in (S) AIR 1956 SC 116, the observations do not go so far as to say that a joint trial of persons accused of different offences under different transactions can be tried together. It cannot be called an 'obiter dictum' which is binding on us. An obiter dictum may not be relevant to the judgment but, it must be the final opinion. Their Lordships have clearly said that they were not deciding the point.

36. There is another case which is cited at the Bar viz.. AIR 1960 SC 661. The case does not relate to any controversy we are in. That was not a case in which different persons accused of offences committed in the course of different transactions were tried together.

Their Lordships have observed :--

'The breach of every provision of the Code does not necessarily make the trial invalid. If the criminal trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct the irregularity can be cured under Section 537, and none the less so because the irregularity involves as must nearly always be the case a breach of one or more of the very comprehensive provisions of the Code. '

37. The crux of the matter is whether it was conducted substantially in the manner prescribed by the Code. If A kills X and B kills Y and if A and B are tried together for the murder of X and Y, it cannot be said that the trial is conducted substantially in the manner prescribed by the Code

38. In AIR 1969 Ker 372. Their Lordships did not give any reasons how misjoinder of charges could include misjoinder of accused persons. They only said -

'Even if it were otherwise, as there was no prejudice to the accused or a failure of justice occasioned by so called misjoinder of charges or persons, Clause (b) of Section 537 was a complete answer to the objection that the alleged misjoinder vitiated the trial. '

39. It is pertinent to note that even their Lordships of the Kerala High Court used the words 'misjoinder of charges or persons'. Therefore it is clear that misjoinder of charges is different from misjoinder of persons.

40. In a Patna case in AIR 1961 Pat 265 their Lordships are of the view :--

' The expression ' misjoinder of charges ' in the new Clause (b) of Section 537 is new and it was nowhere used in the Code previously. The words plainly signify however a violation of the rules laid down in Sections 233, 234, 236 336 and 239

relating to joinder of charges. If this is correct--and I have not the slightest doubt that it is correct--the expression 'mis-joinder of charges', covers not only a case of trial of one person in violation of Section 233 beyond the exception made in Sections 234, 236, and 236 but also that of a trial of more than one person in violation of Section 233 beyond the exceptions provided for in Section 239.'

41. But with due respect I do not see how misjoinder of charges should include misjoinder of persons accused in different transactions unless we read the words 'and of accused person' after the words 'mis joinder of charges' Even taking the most lenient interpretation such words cannot be read

42. Misjoinder of charges. I have already expressed is not anything distinct from what has been stated earlier in Section 537 (b). If there is a mistake in framing the charge that will be curable but when two persons accused of offences in two different transactions the charges may not be defective by themselves. In such a case we cannot say there is any irregularity in the charge irregularity, if we call it an irregularity in such a case will be in jointly trying the persons and not in trying the charger I do not find in the plain meaning of 'the charge' anything including the persons charged. I am therefore unable to agree that Section 537 as amended would cure the defect of a joint trial of persons accused of offences under distinct and separate transactions.