

Mohindar Singh Vs. the State

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Court : Punjab and Haryana

Decided On : Aug-31-1959

Reported in : AIR1960P& H135; 1960CriLJ393

Judge : Tek Chand, J.

Acts : [Evidence Act, 1872](#) - Sections 105 and 106; [Indian Penal Code \(IPC\), 1860](#) - Sections 34 and 307

Appeal No. : Criminal Appeal No. 469 of 1959

Appellant : Mohindar Singh

Respondent : The State

Judgement :

(1) This appeal and Criminal Appeal No. 470/59 which arise out of the same judgment may be disposed of together. In the first appeal, Mohinder Singh is the appellant and the second appeal is filed on behalf of Balbir Singh. Originally, besides the two accused appellants, there were also tried two accused appellants, there were also tried two other persons, Mohammad Aslam a citizen of Pakistan who has been found guilty and convicted and Jita who has been given the benefit of doubt and acquitted.

Mohinder Singh accused appellant has been convicted under S. 307 of the Indian Penal Code and sentenced to undergo three years' rigorous imprisonment. Balbir

Singh appellant and mohammad Aslam accused--the latter has not filed any appeal to this Court--were found guilty under S. 307 read with S. 34 of the Indian Penal Code and each of them was sentenced to undergo rigorous imprisonment for three years.

(2) The prosecution story is that P.W. 4. S. Kashmira Singh, Sub-Inspector, Pubjab Armed Police, along with eight constables had, in the usual routine patrol for detecting smuggling, arranged a nakabandi party, and at 3-0 A.M. on 22-9-1958, they were sitting in ambush at about 300 yards from Mauza Bachiwind. The constables were armed with rifles and the Sub-Inspector had a revolver and also a 'Veri Lite Pistol'.

The letter is carried for illuminating the area at night and as also for signaling as it can usually flash multi-coloured light. At about 3-0 A.M. footfalls of some persons were heard coming in the direction of the police party. The Sub-Inspector challenged those persons while they were still at some distance demanding who they were and they should stop. It may be noted here that when challenging he did not tell them that he was a police officer or theirs was a police party. Before he could discharge the pistol intended for illuminating the area, two or three revolver shots were fired from the side of the accused and the prosecution witnesses felt that they were fired towards them.

On this, Sub-Inspector Kashmira Singh fired his Veri Lite Pistol and in its light he could see four persons including Mohinder Singh accused-appellant who was armed with a revolver, and whom he previously knew and therefore identified him at once. The members of the police party under his orders fired about 10 or 12 shots. When light pistol was again fired, Kashmira Singh saw two persons running away in one direction and the other two in another direction.

The nakabandi party divided itself into two and pursued the fleeing accused. Kashmira Singh and his companions ran in pursuit of Mohinder Singh and another, but could not overtake them, and these two made good their escape. The other batch was successful. They overtook Balbir Singh and mohammad Aslam accused after a pursuit over 100 yards and secured them. During the struggle these two accused received injuries.

A memorandum Exhibit P. A was written at 4-0 A.M. and sent to the Police Station at Lopoke per Foot Constable Tara Singh. Shri Balaram, Station House Officer, P.W. 15, received the memorandum at 4-45 A.M. and proceeded to the place of occurrence reaching them at 5-30 A.M. This spot was at a distance of about four miles from the police station. Accused Balbir Singh and Mohammad Aslam who were held in the custody of the P. A. P. Party were formally arrested and their injury statements were prepared and the two accused were sent for medical examination. He took certain clothes and shoes (Exhibits P. 1 to 6) into his possession and also recovered an eight-anna piece of Pakistan currency from Mohammad Aslam.

(3) Despite search Mohinder Singh accused could not be found till 2nd of October 1958, on which date Shangara Singh Sarpanch produced him before P.W. 15 Shri Balram S. H. O. in the police station Lopoke, and he was put under arrest Jita, the fourth accused, who has been acquitted was arrested some days later. The S. H. O. did not find any fired cartridges at the place of occurrence, and the empties of the bullets which had been fired by the policemen were left with them.

(4) P.W. 3, Dr. Chatrath, Assistant Civil Surgeon, Amritsar had examined Balbir Singh and Mohammad Aslam on 22nd of September 1958 in the afternoon. On the person of Balbir Singh there were 12 simple injuries caused with blunt weapon. Mohammad Aslam had sustained 12 injuries with blunt weapon. Out of these one injury resulting in the fracture of the ulna bone of his right forearm was grievous.

The above prosecution story has been supported by the statements of P.W. 1 Shiv Singh Foot Constable, P.W. 5 Sukhdev Singh Foot Constable. P.W. 6 Tara Singh Foot Constable and P.W. 7 Piara Singh Foot Constable, who were tendered for cross-examination and cross-examined. P. Ws. 8, 9, 10 and 11 who were foot constables accompanying the P. A. P. party; they were tendered for cross-examination but were not cross-examination.

(5) The accused denied the commission of any offence. Mohinder Singh stated that he had been implicated out of enmity and that he had been taken to the police station 15 days after the alleged occurrence and had been falsely involved. He disclaimed any such occurrence having taken place, and denied having fired a

pistol or revolved. He said, that his enemies who were thick with the police, had got him falsely prosecuted.

Balbir Singh, the other accused appellant denied having been apprehended by the police at the spot. He said that he had been brought by the police from his village in the presence of some respectable people of the village, and was given injuries when he was in police custody in the police station. He also stated, that his father had made representations against the police before this occurrence and that he has been falsely involved because his father was a communist.

Mohammad Aslam denied having been apprehended along with Balbir Singh accused, and stated, that the injuries had been received by him at the hands of the police in the police station as they suspected him to be a smuggler. He said that he was a resident of Pakistan, and lived on the other side of the border, and by mistake, he crossed into India, where he was apprehended by the police and was detained in the police station Lopoke on the morning of 22-9-1958. The accused have not produced any evidence in their defence.

(6) The learned Sessions Judge, has accepted the statements, of the eye-witnesses and found the defence story to be false. But he passed some strictures against P.W. 4 Sub-Inspector Kashmira Singh who, according to the learned Judge, did not behave well in the witness-box, his conduct not being straight as he would not give direct answers to the questions put but was inclined to be argumentative. But his conduct was not such as would persuade the trial Court to treat him as a false witness.

According to the learned Sessions Judge the injuries found on the person of the two accused Balbir Singh and Mohammad Aslam materially corroborated the statements of the eye-witnesses, and the disappearance of Mohinder Singh accused for about 10 days after the occurrence indicated that he was hiding himself on account of this occurrence. The Sessions Judge throughout, that from the accused moving together at that hour of the night, it seemed, that they were concerned with smuggling, and that the fire-arm,. Which Mohinder Singh carried must have been known to all his companions.

In his opinion, it was being carried 'for being used in furtherance of their common intention to manage their escape if confronted by somebody.' He also expressed the view that the pistol or the revolver had been used by Mohinder Singh 'in furtherance of the common intention of his three other companions.' Thus, according to the learned Judge, a charge under S. 307/34, Indian Penal Code, had also been brought home to Balbir Singh and Mohammad Aslam accused.

(7) Shri V. K. Ranade, counsel for Mohinder Singh, had advanced the main arguments in this case and the counsel for the other accused Balbir Singh also made a few submissions. It was said, that beyond the oral testimony of the witnesses no other corroborative evidence has been produced. No empty cartridges were found on the spot, from which it could be confirmed, that any one of the accused had fired the pistol or the revolver.

The police party who claimed to have fired several shots from their rifles and from the revolver carried by the Sub-Inspector did not produce the empties. P.W. 4, Sub-Inspector Kashmira Singh stated, that he did not collect the empties of the rounds fired by his party and he was not able to trace any empty of the rounds fired by Mohinder Singh. According to him, his party had fired 14 or 15 shots and he had collected all the 14 or 15 empties of the rounds fired by his men before the Lopoke Police reached there, and he had sent them to P. A. P. Police Lines for replacement.

But this was not his statement before the Magistrate. There he had stated that his party had fired 14 or 15 rounds and 'the empty cartridges were allowed to remain at the spot wherever they fell'. The S. H. O. had stated that he did not find any empty cartridges at the spot. The failure to collect the empty cartridges fired by the police, and the omission to produce them, leaves a serious lacuna, as the production of the empties would have gone to corroborate the oral statements of the prosecution witnesses.

If the empties had been returned to the P. A. P police Lines for replacement, as not alleged by the prosecution witnesses, documentary or other reliable proof might have been given in support of the return of the empties and of their replacement. We are now left with the oral testimony of the witnesses, and the

Sessions Judge felt dissatisfied with the demeanour of Sub-Inspector Kashmira Singh, the leader of the police party.

(8) I agree with the conclusions of the trial Court that Balbir Singh and Mohammad Aslam were present at the spot and were secured after a chase, and that they had been injured while resisting capture. These two accused were, of course, empty handed and were carrying no weapons.

(9) The weapon said to have been fired by Mohinder Singh had not been recovered. According to P.W. 1, when the Sub-Inspector had Discharged the 'Veri Lite Pistol' he could not see any weapons in the hands of any of the four persons. According to P.W. 4 Sub-Inspector Kashmira Singh, he saw four persons, Mohinder Singh accused who was ahead of them and he had a revolver. I think the prosecution story that Mohinder Singh was seen with a pistol or a revolver is probably true.

(10) As 'Veri Lite Pistol' was discharged to illumine the area after two or three shots had been fired from the side of the accused, it cannot be said definitely that Mohinder Singh had done this and not any other companion of his. As Mohinder Singh was seen with a weapon when the spot was illumined immediately after, it is probably true that Mohinder Singh was the person who used the fire arm.

(11) The crucial question, however, in this case is, whether the accused, can be said to have been guilty of the offence charged granting that on hearing the challenge given by S. Kashmira Singh, two or three shots were fired by Mohinder Singh accused who was accompanied by the other accused.

(12) In order to answer this question the ingredients of the offence under S. 307 and the requirements of S. 34 have to be examined. While applying the law to the facts of this case, it has to be borne in mind, that the hour was dark, and from the challenge, the accused persons could not have known that it came from a police officer as the police party was not visible. The prosecution also admits that the firing by Mohinder Singh was before the area was illumined by the discharge of Veri Lite Pistol.

(13) Section 307 of the Indian Penal Code punishes a person doing any Act with such intention or knowledge and under such circumstances that, if he by that Act caused death, he would be guilty of murder.

(14) The offence is constituted by the concurrence of mens rea followed by an actus reus. Both elements of the crime must co-exist; and the proof of guilty intention without the overt Act, or of the deed not shown to have been actuated by any criminal intent, cannot result in conviction. Prosecution has to establish both elements of the crime by proving that the accused did something which in point of law would be an intention of the commission of an offence, and that in taking that step, he was inspired by an intention to achieve the definite objective, which constituted the particular crime. The actual steps taken may manifest the guilty intention in furtherance of which he had proceeded.

(15) An intent per se is not an attempt. Intent implies purpose and attempt is an actual effort made in execution of the purpose. From the steps directed towards the objective sought, the criminal intent must be logically inferable. The attempt for purposes of S. 307, Indian Penal Code, should stem from a specific intention to commit murder, and this blameworthy condition of mind may be gathered from direct or circumstantial evidence, including the conduct of the accused.

(16) An attempt is an intended but unfinished crime, tending but failing to effect its commission. Specific intention to commit the crime of murder is a necessary pre-requisite. In so far as the offence relates to an attempt, the overt act must necessarily be left unaccomplished, for otherwise the prosecution would be for the completed crime. Apart from the necessary means rea, the actus reus must be more than a preliminary preparation.

There must be some overt Act, some step taken, or thing done, adapted to the purpose intended. It is some direct movement towards the consummation of the crime after the preparations have been made. It is not an act done in preparation of a crime, but an act done in preparing to commit it. Moreover, the attempt must have gone so far, that it would result in the commission of the crime intended, unless frustrated by the intervention of extraneous circumstances, independent of the will of the accused.

(17) The means must be apparently, though not really, suitable, so that they can be adapted to the designed purpose. Well-laid plans after careful preparation are sometimes unexpectedly foiled and rendered ineffectual. The best fire-arms loaded, capped, primed and well-aimed may misfire. It may even be, that the party shot at was wearing a jacket of impervious mail, or that the shot hit a bullet proof object inside a pocket, e.g., metal clasp of a pocket book or of a purse, or a cigarette case.

In all such cases the accused is guilty of the offence of attempt to commit murder. But if the means adopted are such, as are apparently and also absolutely, inadequate to accomplish the designed purposes then the case for attempted murder cannot be made out. This is illustrated when a man threatens the life of another, with a child's popgun using a cork or similar innocuous thing as a projectile.

(18) Thus the essentials for criminal attempt are:

- (i) an existence of an intent on the part of the accused to commit a particular offence;
- (ii) some step taken towards it after completion of preparation.
- (iii) The step must be apparently though not necessarily adapted to the purpose designed;
- (iv) it must come dangerously near to success;
- (v) it must fall short of completion of the ultimate design.

(19) Applying such of the above principles as may be applicable to the facts of this case, I am not convinced, that the accused are guilty of the offence for which they were charged. The hour was dark when Mohindar Singh is alleged to have fired two or three shots. There is nothing on the record to suggest that the accused expected an encounter with the police party, and had come prepared for such an eventuality, or when challenged any one of the accused had reason or motive for committing the offence of murder.

On the person of the two accused who were captured after a brief pursuit, neither any were captured after a brief pursuit, neither any weapon of offence nor any smuggled goods or other incriminating articles were found. Accused Mohinder Singh who had surrendered himself to the Magistrate did not offer to produce any weapon and nothing was recovered at his instance. From the mere fact that on being challenged one of the accused had fired two or three shots, it is unsafe to leapt to the conclusion that the shots were fired with murderous intent.

The firing is also consistent with a desire on the part of the accused to scare or warn the unknown challenger that they were armed. From the denial of the accused, that they or any one of them fired the shots, or from the omission on their part to plead that they had discharged the fire-arm in order to frighten the party of Sub-Inspector Kashmira Singh, I cannot deduce that the shots were necessarily or even probably fired with the unlawful intent of taking the life of the person challenging, and for no harmless purpose inconsistent with the guilt.

Moreover, I must presume that ordinarily people do not commit murder merely on being challenged by unseen and unknown persons, and no particular reason has been shown in this case which should have led the accused to resort to fire the revolver in order to commit murder or to cause a lesser injury.

(20) It is then said that the mens rea is shown by the fact that shots were fired in the direction of the police party. The bald statement of P. Ws. 1, 4 and 5, that the shots were fired in their direction suffers from vagueness and want of precision. What is stated by them is in the nature of a conclusion or an opinion without furnishing any supporting reason.

No prosecution witness has stated that he saw any flash or flame, or a streak of light trailing in the wake of the fired projectile, or a point of light proceedings towards him as was alleged by a prosecution witness in *Yashpal v. Emperor*, AIR 1933 All 627 (629). It is nobody's case that the shots fired by the accused whizzed past them. No one saw any accused taking any aim at the police party. In the circumstances of this case there are equal probabilities in favour of the conclusion that the shots were fired at random, in order to scare the persons challenging, and in that case, no mens rea could be said to have been present.

(21) I am aware of certain decision, though not referred to by counsel for the State in which it was held, that where the accused had not taken the defence, that he had fired shots at random, with a view to scare the police officers who wanted to arrest them, the presumption was drawn in favour of unlawful intention. All these decisions rest on their particular facts and on the interpretation of S. 106 of the Indian Evidence Act in the light of those facts, vide, *Dhanwantri Durga Das v. Emperor*, AIR 1933 Lah 852, where the accused had used a pistol with reckless disregard to consequences, against a constable who was chasing him, and the bullet struck him and remained lodged inside.

In AIR 1933 All 627, the police had gone to arrest a proclaimed offender, and he while resisting capture aimed and fired a pistol at a police officer who had gone in search of him. *Emperor v. Munshi*, AIR 1936 Oudh 294, was a case of a police encounter with proclaimed offenders wanted by the police on charges of dacoity with murder and who had exchanged shots with the police sent to arrest them and one of them was killed in the cross-fire.

(22) I feel somewhat sceptical as to the interpretation of the rule relating to burden of proof being on the accused in such cases under S. 307, Indian Penal Code, in view of the observations made in more recent authorities which might profitably have been cited at the Bar, and in particular in *Woolmington v. Director of Public Prosecutions*, 1935 AC 462; *Mancini v. Director of Public Prosecutions*, 1941-3 All ER 272; *R. v. Lobell*, (1957) 41 Cri App Rep 100; *R. v. McPherson*, (1957) 41 Cri App Rep 213; *Mary N. G. v. The Queen*, 1958 AC 173. Reference may also be made to *Attygalle v. The King*, 1936 AC 388 (341): (AIR 1936 PC 169 (170)) and the case of *R. v. Prince*, (1941) 28 Cr App Rep 60: 1941-3 All ER 37.

(23) In *Woolmington's* case, 1935 AC 462, the Lord Chancellor at page 481 observed--

'But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence..... Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the

prisoner's guilt. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained..... If the jury are either satisfied with his explanation or upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

(24) The law as embodied in the Indian Evidence Act incorporates the fundamental rules of evidence taken over from the English Law and the provisions of Ss. 105 and 106 are not to be construed as contravening the fundamental principles of English law.

(25) In Lobell's case, (1957) 41 Cr App Rep 100, Goddard L. C. J., observed:

'If an issue relating to self-defence is to be left to the jury, there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him.

The truth is that the jury must come to a verdict on the whole of the evidence that has been laid before them. If on a consideration of all the evidence the jury are left in doubt whether the killing or wounding may not have been in self-defence, the proper verdict would be Not Guilty.

A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but that they must also consider the evidence for the defence, which may have one of three results: it may convince them of the innocence of the accused, or it may cause them to doubt, in which case the defendant is entitled to an acquittal, or it may and sometimes does strengthen the case for the prosecution.

It is perhaps a fine distinction to say that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but none the less the onus remains on the prosecuting; what it really

amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdicts would be Not Guilty.'

(26) In McPherson's case, (1957) 41 Cr App Rep 213, Lord Chief Justice Goddard, after referring to his dictum quoted above from Lobell's case, (1957) 41 Cr App Rep 100, said:

'The case to which I have just referred shows what the position is where the defendant is setting up a plea of self-defence or provocation, but the jury must be reminded that the onus remains throughout on the prosecution, and therefore if they are left in doubt whether or not the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner.'

(27) Next referring to the case of Prince, (1941) 3 All ER 37, the Lord Chief Justice said:

'The headnote in the All England Reports succinctly sets out the decision: 'On a trial for murder, the jury should be directed that if upon a review of all the evidence they are left in reasonable doubt as to whether, even if the prisoner's explanation is not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.'

(28) The case of Mary N. G., 1958 AC 173, was an appeal before the Judicial Committee of the Privy Council from the Colony of Singapore. Section 107 of the Singapore Evidence Ordinance is in identical language as S. 106 of the Ceylon Evidence Ordinance:

'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.'

In that case the appellant Mary N. G. was charged with and convicted of attempting to cheat a man and thereby attempting dishonestly to obtain money from him by representing to him that she was able to induce the Magistrate before whom the man was to be charged with a criminal offence to shown favour to him. The trial Judge had held that whether or not appellant could induce the Magistrate

to show favour to the accused man, was a fact which was especially within the knowledge of the appellant, and that under section 107 of the Evidence Ordinance, the onus was on her to prove that she could induce the Magistrate to show favour.

(29) The question in appeal before the Privy Council was whether as held by the trial Judge, Section 107 placed upon the appellant the onus of proving that she could induce the Magistrate to show favour to the man, or whether the burden was on the prosecution to prove affirmatively that there had been deceit. It was for determining this question that the statutory provision referred to above relating to the burden of proof was examined.

(30) It was held by the Privy Council--

'that by reason of Section 107 no burden was placed upon the appellant to prove that there had been no deceit. The burden was on the prosecution to prove affirmatively that there had been.'

(31) In *Attygalle v. The King*, 1936 AC 338: (AIR 1936 PC 169), identical language occurring in Section 106 of the Ceylon Evidence Ordinance was examined and the Privy Council held:

'It is not the Law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed.' (1936) AC 338 (341) also reported in AIR 1936 PC 169 (170)).

(32) The observations made in *Seneviratne v. The King*, (1936) 3 All ER 36: AIR 1936 PC 289, are also to the effect that in a criminal prosecution the onus of proof is on the prosecution and there is no obligation upon the prisoner of proving facts especially within his knowledge.

(33) If the act of the accused can reasonably be attributed to an intention other than the one alleged by the prosecution it is but reasonable that the accused must have the benefit of the inference favorable to him. (See *Sukkirappa Goundan v. Emperor*, 1931 Mad WN 861). In *Balbir Singh v. The State* AIR 1959 Punj 332 (339) sitting in Division Bench, I had observed as under:

'The law in India places the burden of proof upon the prosecution to bring the guilt home to the accused and does not admit of any exception. The presumption of innocence has to be dislodged by the prosecution by leading evidence pointing to the guilt of the accused. Under section 105 of the Indian Evidence Act the burden of proving the existence of circumstances bringing the case within any of the general or special exceptions is placed on the accused. All that this means is that it is the duty of the accused to introduce such evidence as will displace the presumption of the absence of circumstances bringing his case within any exception, and that will suffice to satisfy the Court, that such circumstances may have existed. Despite what is stated in section 105 Indian Evidence Act, as to the accused bearing the burden of bringing the case within the statutory exception, the prosecution is not absolved from the burden laid on it by section 102.'

(34) Before a Full Bench of the Rangoon High Court, one of the questions referred to for decision was:

'Is the decision of House of Lords in 1935 A. C. 462, inconsistent with the law of British India, or should it be regarded as explaining the meaning of the phrase 'the burden of proving the circumstances is upon him, and the Court shall presume the absence of such circumstances' in S. 105, Evidence Act 1872?': Emperor v. U. Damapala, AIR 1937 Rang 83 (85).

It was held that the decision in Woolmington's case, 1935 AC 462, 'is in no way inconsistent with the law in British India.' Indeed the principles there laid down from a valuable guide to the correct interpretation of Section 105, Evidence Act.

(35) Under Section 106 of the Indian Evidence Act 'when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.' The key to its interpretation is supplied by the first illustration--

'(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.'

(36) The character and circumstance of this case do not give rise to the inference that the accused necessarily had the intention which the prosecution wanted to make out. The material placed on the record is not sufficient for shifting the burden from the prosecution on to the accused. The initial burden which is always on the prosecution has not been discharged in this case.

(37) Once the first essential as to the existence of mens rea is left unproved, on other element need be looked into. In the absence of unlawful intent, existence of an overt act is immaterial as it cannot then be said to have been adapted towards its accomplishment.

(38) In all cases in which an attempt, as distinguished from a consummated act, is a criminal offence, the existence or non-existence of the specific mens rea is a crucial factor. For the determination of guilt, the presence of mens rea is pivotal, being the sine qua non of the offence.

(39) According to Professor Kenny:

'In the offence of attempt the gravamen is measured by the kind of the crime intended, and this means that the essence of attempt lies in the intention rather than in the acts done in furtherance thereof. In other words the criminality is constituted more by the mens rea than by the actus reus. Yet since mens rea alone is not a crime the courts required a physical element also; but in this case only as much was necessary as could establish the mens rea.'

(40) In all such cases, what is to be seen is, whether the act irrespective of its result, was done with intention or knowledge, and under the circumstances mentioned in Section 307, Indian Penal Code, (vide *Mutalli v. Emperor*, AIR 1930 Lal 253).

(41) The above discussion leads me to the conclusion, that the charge made under Section 307, Indian Penal Code, against accused Mohinder Singh must fail. It also follows, that the conviction of the other accused under Section 307/34, Indian Penal Code, cannot stand. As against these accused the charge could in no case succeed even if accused Mohinder Singh was guilty, as no joint liability alone

with him could be predicated.

(42) In order to attract the provisions of S. 34, Indian Penal Code, it is not enough, that every accused possessed the same intention, but it is necessary to prove further, that there was a prearranged plan, in pursuance of which the criminal act was done. The criminal intention need not be present to start with, and it may be developed in the course of events; and may be inferred from the conduct of assailants. The proved facts of this case do not justify an inference in favour of any preconceived scheme, or any plan, coming into existence at the spur of the moment. The inference of common intention, within the meaning of the term in Section 34, Indian Penal Code, should never be reached, unless it is a necessary inference, deducible from the circumstances of the case; and that same or similar intention must not be confused with common intention, which implies knowledge of one and all and its sharing by one another, (vide, Mahbub Shah v. King-Emperor, ILR (1945) 26 Lah 367: (AIR 1945 PC 118), Tillu Ahir v. Rex, ILR (1949) All 127: (AIR 1949 All 89), In e Nachimuthu Goundan, ILR (1947) Mad 425: (AIR 1947 Mad 259), and Ram Nath Madhoprasad v. State of Madhya Pradesh, AIR 1953 SC 420).

(43) In the result, the appeals of Mohinder Singh and Balbir Singh succeed and they are acquitted.

(44) Mohd, Aslam, the third accused, who is a citizen of Pakistan, has not appealed, but as his case is in no way distinguishable from that of Balbir Singh, his conviction must be set aside and he too is acquitted.

(45) Appeals allowed.