

**Emperor Vs. Durga Charan Bepari Alias Durga Charan Mandal and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/885618](http://sooperkanoon.com/885618)

**Court :** Kolkata

**Decided On :** Apr-28-1922

**Reported in :** AIR1922Cal124,68Ind.Cas.407

**Judge :** Lancelot Sanderson, C.J. and ;Panton, J.

**Appellant :** Emperor

**Respondent :** Durga Charan Bepari Alias Durga Charan Mandal and ors.

**Judgement :**

Lancelot Sanderson, C.J.

1. This is a reference under Section 374 of the Code of Criminal Procedure, in a case which was tried by the learned First Additional Sessions Judge of Bakerganj and a Jury, and in which the three accused were found guilty of murder and were sentenced to death. There is also an appeal by the three accused. Two of the accused, Durga Charan Behari and Hasan Dewan, were found guilty of murder by the unanimous verdict of the Jury under Sections 302 and 34 of the Indian Penal Code, and the other, Alimuddi Mistry, was found guilty of murder under Sections 302 and 149 of the Indian Penal Code. All three were found guilty on the remaining two charges, namely, under Section 364, which is the section dealing with abduction with intent that the person abducted may be murdered or may be so disposed of as to be put in danger of being murdered, and under Section 148, which is the section which deals with rioting by a person or persona armed with

deadly weapons.

2. The first ground--or rather, the ground, upon which the learned Vakil, who argued the case on behalf of the accused, mainly relied, was, that the direction of the learned Judge to the Jury was open to criticism. In my judgment, the direction by the learned Judge to the Jury is open to certain criticisms and I have come to the conclusion that there are material matters which, as far as I can ascertain from the heads of charge to the Jury which are now before us, were not brought to the attention of the Jury. Before I deal with those matters attention should be drawn to the way in which the learned Judge dealt with Section 34 of the Indian Penal Code. I am quite aware that the document which we have before us is not more than 'heads of charge to the Jury,' and I cannot accept the suggestion which was made by the learned Vakil for the accused, that the learned Judge said no more to the Jury than what appears in the heads of charge. The case lasted, (if my recollection serves me right) for six days, and the seventh day of the trial was reserved for the learned Judge summing up; it was not until about 3 o'clock in the afternoon that the Jury retired to consider their verdict. I, therefore, regard this document as no more than 'heads of charge to the Jury.' But, even so, I may say that there are certain matters in the heads of charge which are open to criticism. In the first place, the learned Judge has stated as follows: Section 34 provides that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance of the common intention of all of them, each, of such persons is, severally liable as if he alone had done the deed.' If the learned Judge intended thereby to be informing the Jury of what were the provisions of Section 34, no one can deny that it is a misdirection, because the provisions of Section 34 are not as stated by the learned Judge.

3. But I take it that the learned Judge was giving his own view of the meaning of the section. In my judgment, it is necessary for a learned Judge to read the very words of the section itself to the Jury, if he purports to give them what are the provisions of the section and then, if necessary, to explain what is the meaning of the section. The learned Judge did go on to say: 'In other words, it provides for those cases in which all help to commit, great murder, but in which it is, in the nature of things, difficult to say exactly whose hand actually caused the death of

the murdered person.' It seem? to me that, in that sentence, the learned Judge was on sounder ground; but, even then, having regard to the first part of the direction, I regret to say that I cannot regard it as a satisfactory direction with regard to the provisions of Section 34.

4. Then, his only direction as to what constitutes murder is contained in one sentence 'Murder is the intentional killing of another human being with malice aforethought' That may be a comprehensive way of describing which the meaning of murder is that it is not the way in which learned Judges ought to charge the Jury in this country. It is casual to refer to the sections which relate to culpable homicide and to direct the Jury as to what is culpable homicide and in what circumstances culpable homicide amount to murder; I should not, however, reject this decision to the Jury by the learned Judge on this ground alone, if I felt, quite clear that the misdirection for bad not occasioned a failure of justice. Farther I do not approve of the last paragraph but one at page 40 of the paper-book where the learned Judge was dealing with Sections 302 and 143, viz.: 'This charge is to some extent redundant, and strictly applies only to Alimuddi, for Hasan and Durga Charan are supposed to have been the actual murderers. By Section 149 Alimuddi becomes a constructive murderer and liable for the substantive offence, just as by Section 34 all these accused are equally liable for the murder, as though each of them had committed it single-handed.' In my judgment, if the charge was, in fact, delivered to the Jury in those words or in words which would convey that meaning, in my opinion, the Jury might misinterpret it and they might have been thereby induced to come to the conclusion that there was no more to be said about the matter. In my opinion, this amounts to a misdirection.

5. The next paragraph is material in another respect. The learned Judge was dealing with Section 148 and said: 'Similarly, though all three are charged with rioting armed with deadly weapons under Section 148, Indian Penal Code, it appears from the evidence that the charge will only apply to Alimuddi who was armed with a spear, the other two being unarmed.' In spite of that direction by the learned Judge the Jury found all three of the accused guilty under Section 148. This goes to show that apparently the Jury had not appreciated the learned Judge's direction. In effect, he directed the Jury that only one could be convicted

under Section 148 and yet the Jury found all three of them guilty under that section?.

6. It is difficult to believe that all that the learned Judge said about the evidence is represented in his heads of charge: If it be a full and correct representation of his charge with regard to the evidence, then it appears that the learned Judge did not draw the attention of the Jury to the fact that many of the witnesses who were called on behalf of the prosecution were related to Ananda, who was alleged to be the prime-mover in the prosecution, or to each other: nor did he draw the attention of the Jury to the discrepancies in the evidence of some of the witnesses--discrepancies which certainly did occur.

7. Again, the learned Judge said: 'The plot was apparently hatched on Wednesday and carrier into effect on Thursday.' I have read the evidence carefully. I do not know what evidence is supposed to support the suggestion that a plot was hatched on Wednesday. The learned Counsel and the learned Vakil were not able to assist me on this point. There is the evidence of Isswar Charan Bepari who proved that at Sabdar's house there was a feast and that Alimuddi, Biraj Ali Jemader, Kuti Mollah and Jabbar Ali were invited to it. Hasan Dewan is the son-in-law of Alimuddi and he lived in that house. The feast took place on Thursday, and not on Wednesday, and I do not find anything in that evidence which would justify the suggestion that any plot was then hatched.

8. Towards the end of the learned Judge's summing up, he said: The evidence is that Durga Charan had tied the cloth round the poor woman's neck at the time of the capture, and that so they dragged her away,' It is true that Swarna, the woman who is alleged to have been present at the time the abduction took place, used the words 'tied a cloth round her neck,' On the other hand, the first witness for the Prosecution, Nagarbasi, said: 'Durga Charan had put the upper part of her cloth round her neck and so had taught bar,' which may mean that he, tied it or it may mean that he had merely wrapped it round her neck for the purpose of dragging her away. That by itself would not be so important but for the sentence which follows it; because the learned Judge says: 'long before she got to the river she must have been half-choked, and it would require little more pressure to complete

the suffocation.' That depends to some extent upon how the cloth was tied, and the learned Judge did not draw the attention of the Jury to this question.

9. The learned Judge further said: 'The Jury must also take into consideration the admitted hatred that existed between the deceased and her husband's relatives and must ask themselves whether in their experience such hatred does not, in nine cases out of ten, at any rate in Bakargunj District, furnish a powerful motive for such a crime.'

10. In my judgment, the learned Judge ought to have drawn the attention of the Jury to the evidence of Nagarbashi with regard to this point. Nagarbashi said that as between Kalidas and the deceased there was a settlement of the dispute and it was tailed an amicable settlement, and he went so far as to say: 'there was no quarrel between them after the case between them was amicably settled last Assarh.' In view of this statement I fail to see how the Judge was justified in telling the Jury that there was existing 'admitted hatred.' Finally, the learned Judge directed the Jury as follows: 'As I have already said, which of those abductors actually applied the pressure that ended her life, if this was how she died, is immaterial.'

11. There were three men involved in the charge of murder. It seems to me that the attention of the Jury should have been directed to the individual cases of the three men. As for instance, it may be that Alimuddi had no intention of murdering Nandarani, though he may have been willing to take part in the abduction of the woman. There is no evidence that he laid his hand upon the deceased, though there is evidence that he assisted the actual abduction by holding back and threatening the would be rescuers. For these reasons, in my judgment, it would not be right to allow the verdict of murder to stand in respect of the three accused. Consequently, in our judgment, the verdict of murder and the sentences of death passed upon the three accused must be set aside.

12. That however, does not dispose of the case.

13. The learned Vakil for the accused pressed us to remit the case for a fresh trial, but with regard to the charge under Section 864, the learned Vakil frankly admitted

that he could not say that there was a misdirection as regards that charge, at all events, so far as the two accused, Durga Charan Bepari and Hasan Dawan, are concerned. In my judgment, there was ample evidence in this case to justify the Jury in coming to the conclusion that these two men did abduct the woman and that they abducted her either with the intention of murdering her or with the intention that she might be so disposed of as to be put in danger of being murdered. The Jury unanimously accepted the evidence in this respect, and there being no misdirection in respect of this charge as regards these two accused it is not necessary to send this case back for a fresh trial, and, in our judgment, this Court should uphold the convictions of Durga Charan and Hasan Dawan in respect of the charge under Section 361 of the Indian Penal Code.

14. With regard to Alimuddi I have considerable doubt whether the conviction under Section 334 ought to be upheld. As I have already said, it is possible that this man may have taken part in the abduction without any intention of murdering the woman or putting her in danger of being murdered. The object of the abduction, so far as he was concerned, may have been something quite different. In this connection it is to be remembered that the evidence of Abdul was to the effect that he had seen two men only near the place where the body was found, and, in our judgment, it would be safer in the interests of justice to hold that in the case of Alimuddi, the conviction under Section 364 should be set aside.

15. There remain the convictions under Section 118. With regard to Durga Charan and Hasan Dewan, I agree with the learned Judge that there is no evidence that these two men were armed with any deadly weapon, or with any such weapon as is mentioned in Section 143. Consequently, the convictions of those two men under Section 143 must be set aside. The conviction of Alimuddi, however, under Section 148 ought, in our judgment, to stand. He was armed with a deadly weapon and he was guilty of rioting. There was an assembly of five or more persons and on the evidence, which has been accepted by the Jury, there is no doubt that the common object of that unlawful assembly was to abduct the woman, and by means of criminal force, or show of criminal force, to compel the deceased woman to do what she was not legally bound to do. In other words, the case would come within the meaning of Section 141, Sub-clause (3) or Sub-clause (5) of the Indian

Penal Code. In our judgment, therefore, the conviction of Alimuddi under Section 148 must stand.

16. The result of our judgment is that the convictions of all the three accused, namely, Durga Charan Bepari, Hasan Dewan and Alimuddi Mistri, for murder, and the sentences of death passed upon them are set aside. The conviction of Alimuddi Mistri under Section 364 of the Indian Penal Code and the convictions of Durga Charan Bepari and Hasan Dewan under Section 148 of the Indian Penal Code are also set aside. But the convictions of Durga Charan Bepari and Hasan Dewan under Section 334 of the Indian Penal Code are upheld and the conviction of Alimuddi Mistri under Section 148 is upheld. Under these circumstances, we do not think it necessary to direct a new trial.

17. Now, there remains the question of sentence. My learned brother and I regard this as a very serious case and it is such a serious case that we have had considerable hesitation whether we ought not to remit the case in order that there should be a further trial on the charge of murder, but after due consideration we have decided not to take that course.

18. Having regard to the facts of the case, the sentence we pass upon each of the accused, Durga Charan Bepari and Hasan Dewan, is ten years' rigorous imprisonment under Section 364 : and the sentence on the accused Alimuddi Mistri is three years' rigorous imprisonment under Section 148 of the Indian Penal Code.

**Panton, J.**

19. I agree.

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