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January 7

AFRAHIM SHEIKH AND OTHERS

v.

STATE OF WEST BENGAL

(M. HIDAYATULLAH AND RAGHUBAR DAYAL JJ.)

Criminal Trial—Penal Code—Conviction under s. 304 *Part II—If can be read with s.* 34—*"Intention" & "Knowledge"—Indian Penal Code,* 1860 (45 *of* 1860), *ss.* 34, 35, 38 *and* 304.

The six appellants were convicted under s. 304 Part II with s. 34 of the Indian Penal Code by the Sessions Judge and their appeal was summarily dismissed by the High Court. On appeal by special leave, it was contended that s. 304, Part II could not be read with s. 34 Indian Penal Code because the second part of s. 304 excluded intention and was concerned with knowledge and the conviction was illegal.

Held: (i) Section 34 when it speaks of a criminal act done by several persons in furtherance of the common intention of all, has regard not to the offence as a whole, but to the criminal act, that is to say, the totality of the series of acts which result in the offence. In the case of a person assaulted by many accused, the criminal act is the offence which finally results, though the achievement of that criminal act may be the result of the action of several persons.

(ii) Knowledge in s. 304 Part II is the knowledge of likelihood of death and the common intention is with regard to the criminal act. If the result of the criminal act is the death of the victim and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, there is no reason why s. 34 should not be read with the second part of s. 304 to make each liable individually.

Ibra Akanda v. *Emperor,* I.L.R. [1942] 2 Cal. 405 and *Saidu Khan* v. *State,* I.L.R. [1952] I All, 639, approved.

Ramnath v. *Emperor,* A.I.R. 1943 All. 271. *Shahibzada* v. *The Crown* A.I.R. 1950 Peshawar 24, *Debi Chand Haldar* v. *Emperor,* 41 C.W.N. 570 and *Barendra Kumar Ghosh* v. *Emperor,* (1925) I.L.R. 52 Cal. 197. referred to.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 134 of 1963.

Appeal by special leave from the judgment and order dated March 5, 1963, of the Calcutta High Court in Criminal Appeal No. 156 of 1963.

D. N. Mukherjee, for the appellants.

P. K. Chakravarti and *P. K. Bose,* for the respondent.

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The Judgment of the Court was delivered by

HIDAYATULLAH J.—The six appellants who have appealed to this Court by special leave were convicted by the Assistant Sessions Judge, Birbhum under s. 304 Part II read with s. 34 of the Indian Penal Code and sentenced to six years' rigorous imprisonment each. Their appeal to the High Court was summarily dismissed. When the appellants applied for a certificate in the High Court they made it plain that the only point which was required to be considered by this Court was whether s. 34 could be read in conjunction with Part II of s. 304, Indian Penal Code. In this Court the argument was confined to this point of law. The High Court rejected the application for the certificate pointing out that the controversy had been settled by a Full Bench decision of the High Court reported in *Ibra Akanda* v. *Emperor*(1). The learned Judges were of the opinion that the point was not of sufficient importance for permitting the appellants to take an appeal to this Court.

For the consideration of the point of law which has been debated before us, we may state only such facts as will bring out the controversy. One Abdul Sheikh in the company of his son, Adut, aged 13, went to his field in village Noapara to uproot linseed plants. This was on the morning of March 13, 1962. While he was so employed, two of the appellants, Afrahim and Jesed, appeared on the scene, and Afrahim asked Jesed to catch hold of Abdul Sheikh. Abdul Sheikh took to his heels and was chased by these two appellants, who overtook him and threw him down on the ground. Immediately thereafter, there appeared on the scene the remaining appellants. Jarahim was armed with a *ballam* and he started to hit Abdul Sheikh on his legs with the *ballam*. The appellant, Manu, arrived with a *sabal* (crowbar), and began to strike Abdul Sheikh and the appellant, Mesher, began to strike Abdul Sheikh with a *lathi*. All this, while, the sixth appellant, Makid, held Abdul Sheikh by the legs and Afrahim and Jesed held him down by his head and shoulders. The incident was witnessed by Adut and two others, and it is on the testimony of Adut and these two

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other witnesses, to whom reference is unnecessary, that the learned Assistant Sessions Judge, Birbhum, came to the conclusion that the offence was committed in the manner described above. Abdul Sheikh was seriously injured; both his legs below the knee were fractured and one arm above the wrist was also fractured. He had also some incised wounds and some bruises. He was examined by one Dr. Bashiruddin, who gave him first aid. Dr. Bashiruddin stated on oath that Abdul Sheikh narrated to him the incident and named all the six appellants. Later, Abdul Sheikh was removed to Nalhati Health Centre, and while arrangements were being made for recording his dying declaration, he succumbed to his injuries. He had, however, made dying declarations to some of the prosecution witnesses and they have deposed to the fact that he had named the six appellants as his assailants.

In this appeal, we did not allow Dr. D. N. Mukherjee, counsel for the appellants, to argue on facts. We assumed that the incident took place as narrated by the witnesses. Mr. Mukherjee contends that the conviction of the appellants under s. 304, Part II is illegal, because according to him, s. 34 cannot be called in aid, as the second part of s. 304 concerns itself with knowledge and absolutely excludes intention as the ingredient of the offence. He relies upon the minority decision of Das J. (as he then was) in *Ibra Akanda* v. *Emperor*(1). In that case, the learned Judge had expressed the opinion that s. 34 was incapable of being read with the second Part of s. 304. With the view of the learned Judge, Lodge J. differed and the case was then placed before Khundkar J. who agreed with Lodge J., and the decision was that s. 34 could be so read. At the hearing Mr. Mukherjee drew our attention to three other cases in which a view supporting his contention appears to have been taken. The first is a single Judge decision of the Allahabad High Court reported in *Ramnath* v. *Emperor*(2), and the other is a Division Bench case from Peshawar reported in *Sahibzada* v. *The Crown*(3). He also referred to an earlier Calcutta case reported in *Debi Charan Haldar* v. *Emperor*(4), in which a division Bench had expressed some

(1) I. L. R. (1944) 2 Cal. 405.
(2) A.I.R. 1943 All. 271.
(3) A.I.R. 1950 Peshawar 24.
(4) 41 C.W.N. 570.

doubts about the applicability of s. 34 to s. 304, Part I. As against this, Mr. Chakravarti, counsel for the State relied upon a Full Bench decision of the Allahabad High Court reported in *Saidu Khan* v. *State*(1) where it has been clearly held that s. 34 can be so read.

Before dealing with the point of law, we shall refer to the essential facts once again. Apart from the fact that there is proof that there were two parties and there was enmity between the appellants and Abdul Sheikh, the facts proved in the case clearly establish that Abdul Sheikh had gone for a peaceful purpose in the company of his young son, and immediately after his arrival, he was chased by two of the appellants and caught and felled to the ground. After this the remaining four appellants appeared and beat Abdul Sheikh with diverse weapons, while those who were not armed, held him pinned to the ground. Mr. Chakravarti is right in contending on these facts that the act took place in furtherance of a common intention. No doubt, as has been laid down by the Privy Council and by this Court in cases which are now very familiar, common intention must exist before the criminal act is perpetrated, and that is the essence of s. 34. Here, in our opinion, that requirment was completely satisfied, because the six accused could not but by a prior concert have appeared simultaneously at the scene, and chased and overthrown the victim, held him down and beaten him. The facts disclosed in the evidence clearly establish a prior concert amongst the six appellants. It has been so infered by the Assistant Sessions Judge, and we see no reason to differ from him.

Now that the criminal act has been held by us to have been the result of a previous concert and in furtherance of the common intention, we shall proceed to examine whether s. 34 I.P.C. can be made applicable for the purpose of holding that culpable homicide not amounting to murder was committed, and that each of the appellant was responsible for the offence. Section 34 of the Indian Penal Code reads as follws:

> "When a criminal act is done by several persons, in furtherance of the common intention of all, each

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of such persons is liable for that act in the same manner as if it were done by him alone."

In s. 33 which precedes, it is laid down that the word "act" denotes not only a single act but also a series of acts. In other words, as was stated by the Judicial Committee, in *Barendra Kumar Ghosh's case*(1) "a criminal act means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, *i.e.*, a criminal offence." Here, the beating was perpetrated not by a single individual but by three persons with whom others were acting in concert. The criminal act resulted in the criminal offence of culpable homicide not amounting to murder. There is no dispute as to that. Whether all the appellants individually would be responsible for the death of Abdul Sheikh is the question to be determined, and that conclusion can only be reached if it can be said that the act which was committed was done in furtherance of a common intention. It is argued that s. 304 makes a difference in its two parts between the commission of the offence of culpable homicide with a particular intention and the commission of the same offence without that intention but with a particular knowledge. It is urged that this distinction makes it impossible that s. 34 which deals only with common intention can be read with it. Section 304 reads as follows:—

> "Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;
>
> or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but

(1) [1925] I.L.R. 52 Cal. 197.

> without any intention to cause death or to cause such bodily injury as is likely to cause death."

Sec. 304 does not define culpable homicide not amounting to murder. That definition is to be found in s. 299, which provides:

> "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

Culpable homicide is the causing of the death of a person in three ways: (1) with the intention of causing death, (2) with the intention of causing such bodily injury as is likely to cause death, and (3) with the knowledge that the offender is likely by such act to cause death. The offence of culpable homicide becomes murder when four circumstances exist. They are mentioned in s. 300. A number of exceptions are however included, and those exceptions show extenuating circumstances on strict proof of which the offence is again brought down to culpable homicide not amounting to murder. The causing of the death of a person by doing an act accompanied by intention in the two ways described in s. 299 or with the knowledge that the act is likely to cause death also described there is thus distinguished from cases of deaths resulting from accident or rash and negligent act and those cases where death may result but the offence is of causing hurt either simple or grievous. Once it was established, as was established in this case, that the act was a deliberate act and was not the result of accident or rashness or negligence, it is obvious that the offence which was committed was one under s. 304. In the present case however death was not the result of the act of a single individual but was the result of the act of several persons, and they shared the common intention, namely, the commission of the act or acts by which death was occasioned.

Section 34 is a part of a group of sections, of which some other sections may also be seen. Section 35 is as follows:

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"Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention."

In this section also the responsibility is shared by each offender individually if the act which is criminal only by reason of certain criminal knowledge or intention is done by each person sharing that knowledge or intention. Indeed, this section also was applicable here. Under s. 37, "when an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence." By co-operating in the doing of several acts which together constitute a single criminal act, each person who co-operates in the commission of that offence by doing any one of the acts is either singly or jointly liable for that offence. Section 38 then provides:

"Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.

Viewing these sections in this manner, it is obvious that two sections in this group deal with individual responsibility for a single criminal act perpetrated by a large number of persons who either share a common intention or possess the criminal knowledge (ss. 34 and 35) and the third with co-operation between several accused in the completion of the criminal act (s. 37). Lastly s. 38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention common or otherwise or knowledge.

Section 34, when it speaks of a criminal act done by several persons in furtherance of the common intention of all, has regard not to the offence as a whole, but to the criminal act, that is to say, the totality of the series of acts which result in the offence. In the case of a person assaulted by many accused, the criminal act is the offence which finally results, though the achievement of that criminal act may be the result of action of several persons. No doubt, a person is only responsible ordinarily for what he does and s. 38 ensures that; but the law in s. 34 (and also s. 35) says that if the criminal act is the result of a common intention, then every person who did the criminal act with the common intention would be responsible for the total offence irrespective of the share which he had in its perpetration. In *Barendra Kumar Ghosh's case*(1), the Judicial Committee observed:

> "Sec. 34 I.P.C. deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all as if he had done them himself. 'That act' and then again 'it' in the latter part of the section must include the whole of the action covered by the criminal act in the first part of the section."

Provided there is common intention, the whole of the result perpetrated by several offenders, is attributable to each offender, notwithstanding that individually they may have done separate acts, diverse or similar. Applying this test to the present case, if all the appellants shared the common intention of severely beating Abdul Sheikh and some held him down and others beat him with their weapons, provided the common intention is accepted, they would all of them be responsible for the whole of the criminal act, that is to say, the criminal offence of culpable homicide not amounting to murder which was committed, irrespective of the part played by them. The common intention which is required by the section is not the intention which s. 299 mentions in its first part. That intention is individual to the offender unless it is shared with others by a prior concert in which case ss. 34 or 35 again come into play. Here, the common

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intention was to beat Abdul Sheikh, and that common intention was, as we have held above, shared by all of them. That they did diverse acts would ordinarily make their responsibility individual for their own acts, but because of the common intention, they would be responsible for the total effect that they produced if any of the three conditions in s. 299, I.P.C. applied to their case. If it were a case of the first two conditions, the matter is simple. They speak of intention and s. 34 also speaks of intention.

The question is whether the second part of s. 304 can be made applicable. The second part no doubt speaks of knowledge and does not refer to intention which has been segregated in the first part. But knowledge is the knowledge of the likelihood of death. Can it be said that when three or four persons start beating a man with heavy lathis, each hitting his blow with the common intention of severely beating him and each possessing the knowledge that death was the likely result of the beating, the requirements of s. 304, Part II are not satisfied in the case of each of them? If it could be said that knowledge of this type was possible in the case of each one of the appellants, there is no reason why s. 304, Part II cannot be read with s. 34. The common intention is with regard to the criminal act, *i.e.*, the act of beating. If the result of the beating is the death of the victim, and if each of the assailants possesses the knowledge that death is the likely consequence of the criminal act, *i.e.*, beating, there is no reason why s. 34 or s. 35 should not be read with the second part of s. 304 to make each liable individually.

This matter has been elaborately considered in the judgment of Lodge J. and again in the Full Bench decision of the Allahabad High Court. We do not think that we need say more on this, because we are in agreement with the decision given by the majority in the Calcutta High Court case and the Full Bench decision of the Allahabad High Court. It appears to us that in other cases doubt was felt because s. 304 is in two parts, and first part is concerned with culpable homicide committed with two types of intention and the second part with culpable homicide committed with a particular knowledge. It appears that it was felt that s. 34, which deals with common intention, could not be read with

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the second part of s. 304. In our opinion, the learned Judges who held that view and we say it respectfully fell into the error of viewing the second part of s. 304 divorced from common intention whatever. A person does not do an act except with a certain intention, and the common intention which is requisite for the application of s. 34 is the common intention of perpetrating a particular act. Previous concert which is insisted upon is the meeting of the minds regarding the achievement of a criminal act. That circumstance is completely fulfilled in a case like the present where a large number of persons attack an individual, chase him, throw him on the ground and beat him till he dies. Even if the offence does not come to the grade of murder, and is only culpable homicide not amounting to murder, there is no doubt whatever that the offence is shared by all of them, and s. 34 then makes the responsibility several if there was a knowledge possessed by each of them that death was likely to be caused as a result of that beating. This circumstance is completely fulfilled in the present case, and we are, therefore, satisfied that the conviction of the appellants was proper, and see no reason to interfere.

In the result, the appeal fails and is dismissed.

Appeal dismissed.

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v.

SETH KIRORIMAL LUHARIWALA

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(M. HIDAYATULLAH AND J. C. SHAH JJ.)

Rent Control—Order for deposit of rent at interlocutory stage—If proper—Delhi Rent Control Act, 1958 (59 *of* 1958), *s.* 15(1)—*Indian Income-tax Act,* 1922 (11 *of* 1922), *s.* 46(5A).

The respondent made an application against the appellant under s. 14 of the Delhi Rent Control Act. In reply the appellant pleaded