ALLAHABAD HIGH COURT

Harchanda

Vs.

Rex

Criminal Appeal No. 102 of 1948

(Wanchoo, J. On Difference Between Raghubar Dayal and Agarwala, JJ.)

16.02.1948. 03.11.1949

JUDGMENT

Raghubar Dayal, J.

1. Harchanda and Babu appeal against their conviction under Section 302, read with Section 34, Penal Code.

2. Five other persons tried with these two appellants were acquitted by the Sessions Judge.

3. The prosecution case is that Atar Singh deceased asked Babu and Gopi to remove the earth which had been placed by them in order to construct a small platform or step to climb up the main platform, as this collected earth obstructed the passage. Harchanda and four other persons, all relations, arrived on the spot. Atar Singh spread over the earth. This led to exchange of abuses. The seven persons then went inside their house and returned armed and attacked Atar Singh with a spear, kirpan and lathis. The two appellants and three other persons are said to have been armed with lathis, Durga Das with a spear and Sukhbir with a kirpan.

4. Atar Singh died the next day.

5. Dr. Khan, Civil Surgeon, conducted the post-mortem examination and found five injuries on the deceased. Two were incised wounds leading into the abdominal cavity, two were contusions on the left side of the head and one was a contused wound on the nail of the right thumb. The peritoneum was cut below the incised wounds. Below the contusions on the head clotted blood was found in the left temporal region and in the muscle. The Civil Surgeon has expressed the opinion that death was caused by hemorrhage and shock due to the injuries and also due to distension of the abdomen on account of peritonitis.

6. The acquitted persons denied the allegation about their taking part in this incident. Babu and Harchanda admitted their part, but gave a different version. It is that Atar Singh wanted a passage for his cart and on the refusal of Babu and his relations he cut their old platform with a spade and attacked Babu with a lathi. Babu fell down. Chandrapal, nephew of Atar Singh, came with a spear. When Atar Singh struck Harchanda with a lathi Harchanda struck back with a spear in self-defence. It is in the evidence of Durgan, D. W. 1, that Harchanda snatched this spear from Chandrapal when Chandrapal aimed it at Babu.

7. The learned Sessions Judge has disbelieved the defense version, and I think rightly. There is ample evidence for the prosecution in support of the prosecution case. There is nothing which can be said against it. Still the learned Sessions Judge gave the benefit of the doubt to five of the accused who were put on trial. One of his reasons for giving the benefit of the doubt was that the prosecution alleged that five accused beat Atar Singh with lathis, but there were only three lathi injuries on the deceased and that it was doubtful that if five persons had assaulted Atar Singh with lathis he would have received only three lathi blows. I do not consider this to be a good reason for doubting the prosecution story that five persons were using lathis. The other reason is that, according to the dimensions of the incised wounds, they were caused with a spear and could not be the result of a kirpan or sword and that it was doubtful that any kirpan or sword was used. This again is an unnecessary doubt. The Civil Surgeon expressed the opinion that the wounds 1" x ¼" and 3/4" x ¼" leading into the abdominal cavity could be caused by a spear or a kirpan. He was not questioned about any wound being not caused with a kirpan and I do not consider it reasonable, in the circumstances, to express doubt about the incised wound being caused with a kirpan. Even if the learned Sessions Judge entertained a doubt about the use of the kirpan, he had no reason to doubt the use of the spear which was attributed to Durga Das, one of the accused who have been acquitted.

8. The learned Sessions Judge recorded the conviction of Harchanda and Babu on the finding that Harchanda brought a spear and Babu a lathi and attacked Atar Singh with those weapons. It is not the case of the prosecution that Harchanda brought a spear. The use of the spear was attributed to Durga Das.

9. The main point urged in appeal on behalf of the appellant, though not deposed to by the Civil Surgeon, is that it appears that Atar Singh died on account of the incised wounds and that the accused appellants were not responsible for those wounds as, according to the prosecution evidence, they were not armed with a sharp-edged weapon. The persons alleged to have used sharp-edged weapons have been acquitted, and as no unknown persons are said to have taken part in this incident, it would follow that the appellants could not be responsible for acts alleged to have been done by persons who have been held not to have taken part in this incident. I am not inclined to agree with these contentions.

10. Firstly, the very basis for this contention that Atar Singh died on account of the incised

wounds is not a good basis when the doctor does not state so and rather states that death was due to shock and hemorrhage from the injuries and also due to distension of the abdomen on account of peritonitis. Even if the incised wounds were the main cause of death and not the sole cause, it would have been expected that the Civil Surgeon would have deposed so. To my mind, therefore, the death of Atar Singh was due to the cumulative effect of all the injuries and, therefore, the appellants on the basis of their own conduct, if that conduct consisted only in the causing of injuries with lathis, would be responsible for the death of Atar Singh.

11. Even if it be assumed that Atar Singh died on account of the incised wounds only, I am of opinion that the accused cannot be relieved of the responsibility of causing Atar Singh's death. There is no doubt that Atar Singh received incised wounds at the hands of his assailants. If the assailants were only the two appellants, as is urged for them, in view of the acquittal by the Sessions Judge of the other five persons alleged to have taken part in the incident, it must be held, in spite of the oral statements of the prosecution witnesses that the incised wounds were caused by Durga Das and Sukhbir, who have been acquitted, that the appellants did cause these injuries. All the injuries must have been caused by the assailants, and if the decision of the Sessions Judge is that the assailants were the two appellants only, I find no difficulty in concluding that all these five injuries, including the incised wounds, were caused by these appellants. If the two appellants were not the only assailants and the incised wounds were caused by some other person or persons, the appellants cannot escape responsibility for those wounds. They would be responsible for those wounds and for the causing of Atar Singh's death either by the application of Section 34, Penal Code, if the total number of assailants was less than five, or by the application of Section 149, if the number of total assailants was five or more than five.

12. The fact that the Sessions Judge has given the benefit of doubt to five co-accused does not amount to a finding that the assailants of the deceased were only the two appellants. Such a conclusion would have been possible if it had been found definitely that the other five accused did not take part in the incident. The finding that they are not proved to have taken part in the incident beyond reasonable doubt is not such a definite finding. It amounts, in my opinion, to a finding that though these accused appear to have taken part, yet there are some considerations which create doubt and make it impossible to hold that they did actually take part in the transaction and that, therefore, they are given the benefit of the doubt and are acquitted. Of course, if the number of participants in an alleged riot is limited and the persons convicted are less than five, they cannot be convicted of the offence of rioting, for the simple reason that it is not proved that five or more people took part in that incident. At least five people are necessary to form an unlawful assembly and if it is not proved as a fact that at least five persons had taken part in the incident, no offence of rioting can be established. This has been held in *Ram Rup v. Emperor*[1], and also appears to have been held earlier in *Sadho v. Emperor*[2],

13. The earlier case of 1934 in fact went still further. It was held that if the Court finds that there were at least five persons who took part in the transaction, the Court can still record a finding of

conviction under Section 147 against such persons who are proved to have taken part in the incident even if the number of such persons be less than five and the number of persons who have taken part in the incident was limited, and after giving the benefit of the doubt to certain people, the number left becomes less than five. It is unnecessary at this stage to say anything about the correctness of this view. There is nothing wrong with this view if it be practically possible for a Court to find as a definite fact that though persons less than five in number have been proved to have taken part in the incident and that the case against the others of having taken part in the incident is doubtful, yet it feels satisfied that at least five persons had taken part in that incident. As

[1]1944 ALJ 447 : (AIR 1945 All 31 : 46 Cr LJ 198)
[2]1934 ALJ 640 : (AIR 1934 All 881 : 35 Cr LJ 1494)

pointed out in the 1944 case, there is some illogicality in convicting persons less than five for an offence of riot, if the remaining persons alleged to have taken part in the incident have been acquitted. It will, however, to my mind be a greater illogicality if the convicted persons be held to be the only assailants and yet be held not to have caused all the injuries merely because the prosecution witnesses alleged the causing of certain injuries to hare been by such persons who have been acquitted. I am, therefore, of opinion that whatever line of reasoning be adopted, the practical view to which I find no legal objection is that in cases like the one before us the convicted persons must be held to be responsible for the result of the injuries which were alleged to have been caused by persons who had been acquitted.

14. I would, therefore, hold that the appellants were responsible for causing the death of Atar Singh and that they have been rightly convicted of the offence under Section 302, read with Section 34, Penal Code.

Agarwala, J.

15. I wish I could agree in the order proposed by my learned brother for whose opinion I have the highest regard, but I find myself faced with some legal difficulties which compel me to differ from him.

16. The two appellants Harchand and Babu were prosecuted along with five other persons, Durga Das and his son Ajai Singh, and his nephews Gopi, Brahma and Sukhbir for having committed offences under Sections 148 and 302/149, Penal Code.

17. The prosecution case was that the seven accused lived as members of a joint Hindu family in the same house in village Karora. On the south of their house is their recently constructed Dukaria, a small room. In front of this Dukaria is a platform 3 Ft. or 4 Ft. high. To the west of the house of the accused beyond a lane is the house of Atar Singh deceased and the width of the lane between the two houses is said to be very small about 3 or 4 paces. On the morning of 24th June 1947 the accused put some earth in front of the platform which they had recently constructed, in

order that a small platform to serve as a step to the bigger and higher platform may be made. Atar Singh asked Babu appellant and Gopi accused to remove the earth and not to obstruct the passage by constructing the smaller chabutra, but they did not pay heed to his request. In the meantime, the other five accused, including Harchand appellant, arrived on the scene. Atar Singh then spread over the earth with his hands and feet. On this there was an exchange of abuses between him and the accused. The accused then entered the Dukaria and returned back, Durga Das with a spear, Sukhbir with a kirpan and the rest with lathis and simultaneously attacked Atar Singh with these weapons. Atar Singh fell down and died the next day.

18. The post mortem report on the body of Atar Singh showed that he had received the following five injuries : (1) Incised wound 1" x ¼" leading into abdominal cavity, (2) incised wound 3/4" x ¼" leading into abdominal cavity, (3) contused wound ½" x ¼" skin below the nail of right thumb, (4) contusion 3/4" x 3/4" left side of head, (5) contusions 2" x 1" left side of head. Below injuries Nos. 4 and 5 there was clotted blood found in left temporal region and in the muscle. In the membrane there were marks of congested surface and the brain surface was deeply congested. But there was no fracture of the skull. The injuries 3, 4 and 5 were simple. These were inflicted by a blunt weapon like a lathi. The peritoneum was cut below injuries 1 and 2 and the cavity contained 20 ounces of blood and exudate. The small intestines were also cut at two places. The injuries 1 and 2, according to the doctor, could be caused by a spear or a kirpan. The cause of death was not stated by the doctor in his statement in Court. But from the post mortem report we find that the cause of death was haemorrhage and shock of injuries and also distention of abdomen on account of peritonitis. It is clear that the main cause of death was the cutting of the intestines by the injuries 1 and 2 inflicted by a sharp-edged weapon. It is most improbable that injuries 3, 4 and 5 inflicted by a blunt-edged weapon, standing by themselves, could have caused the death of the deceased. At any rate, there is no evidence on the record to show that these three injuries were sufficient to cause the death of the deceased.

19. It should be borne in mind that, according to the prosecution, only two persons, Durga Das and Sukhbir had sharp-edged weapons. Durga Das was credited to have held a spear and Sukhbir a kirpan. All the rest, including the two appellants, had lathis. Upon the prosecution case, therefore, the two appellants could not have inflicted the incised wounds.

20. The defense of the appellants was that they were present and that one of them used a spear and caused spear injuries but that it was done in self defense. The rest of the accused denied their presence.

21. The learned Sessions Judge disbelieved the defense and arrived at the following conclusion :

> "Only three lathi blows struck the deceased. The prosecution story that five of the accused assaulted him with lathis is doubtful. It is argued that it is quite possible that the lathis of all the accused may not have struck the deceased, but at the same time it is doubtful if five

> persons had assaulted Atar Singh with lathis, he would have received only three lathis blows. The dimensions of the incised wounds were 1 and 3/4" long and ¼" broad. These wounds were probably caused by a spear and could not be the result of a kirpan or sword. It is doubtful that any kirpan or sword was used. The result is that it is proved beyond doubt that two incised wounds with a spear and three lathi injuries were caused to Atar Singh. It is admitted by Babu that he gave lathi blows to Atar Singh and by Har Chanda that he gave spear blows to Atar Singh. In my opinion it is doubtful that any of the other accused were responsible for the injuries caused to Atar Singh and I give them the benefit of this doubt .....

Babu and Har Chanda accused attacked Atar Singh with a lathi and spear simultaneously."
In the result the learned Sessions Judge acquitted the accused, other than the appellants, and convicted the appellants under Sections 302/34, Penal Code, but acquitted them of the offence under Section 148, Penal Code. It is quite clear that what the learned Sessions Judge held about the acquitted 5 accused was that it was doubtful if any of them were responsible for the injuries caused to Atar Singh. In his opinion all the five injuries were caused by the two appellants and the two appellants have been held guilty on that ground. It is clearly not a case in which the learned Sessions Judge held that the incised wounds were caused by one or the other of the 5 accused acquitted by him. Although it is true that the learned Sessions Judge does not definitely say, in so many words, that none of the five persons were responsible for the injuries, yet he clearly envisages the possibility of none of them having been so responsible and definitely came to the conclusion that the two appellants were responsible for all the injuries.

22. There is no Government appeal before us against the acquittal of the 5 accused. Therefore, we have to take the findings of the learned Sessions Judge, so far as those 5 accused are concerned, as correct.

23. The next question is whether we can agree with the learned Sessions Judge in holding that the two appellants must be held guilty because they inflicted the five injuries, including the two incised wounds. The prosecution evidence, as I have already noted, credits the appellants only with having used lathis and not a spear or a kirpan. According to the prosecution witnesses, therefore, the incised wounds could have been inflicted only by Durga Das or Sukhbir and not by the appellants. In holding that the appellants were responsible for the incised wounds, the learned Judge has relied upon the admission of Harchand that he gave spear blows to Atar Singh, but this admission was coupled with a statement that these blows were given in self-defense in certain circumstances. It is not possible to take a part of an admission of an accused and reject the other part. The admission can be taken either as a whole or not at all. If we reject the admission, we are left with the prosecution evidence and, as I have said before, the prosecution evidence does not prove that the incised wounds were inflicted by any of the two appellants. In my opinion, therefore, we must hold that the appellants inflicted the three contused wounds only and not the two incised wounds. As I have already said, there is no evidence on the record to show that the

three contused wounds by themselves were sufficient to cause the death of the deceased. The question then arises whether the two appellants can be held guilty of having caused the murder because some one else inflicted the incised wounds.

24. Now in a criminal case the burden of proof is always on the prosecution. It is for the prosecution to establish the responsibility of the accused for the crime alleged. Having regard to the fact that there is no appeal against the acquittal of the other five accused before us and having regard to the fact that we cannot interfere with the finding of the learned Sessions Judge, so far as it concerns those accused, we cannot hold that either Durga Das or Sukhbir was responsible for inflicting the incised wounds : and since it was not the prosecution case that there was some unknown person along with the accused, who was also holding a sharp-edged weapon, we cannot ascribe the infliction of the incised wounds to some such unknown person. The result of the prosecution evidence taken with the findings of the learned Sessions Judge, is that the prosecution is unable to explain the infliction of the incised wounds. In my opinion, in such a case the accused cannot be held constructively liable for the infliction of those wounds.

25. It is suggested that since the learned Sessions Judge has not definitely held that Durga Das or Sukhbir did not participate in the assault, but has only given them the benefit of doubt, it is open to us to hold that either one or both of them were concerned in the affair. I am afraid this is not a correct view to take.

26. When the evidence on record is conclusive against an accused, we hold that he is guilty. When it is conclusively in favor of an accused, and also when it is inconclusive- neither conclusive this way or that-in both cases we hold the accused "not guilty" and acquit him. When there is a verdict of not guilty or acquittal, an accused person is entitled to say that he must be presumed to be absolutely innocent whatever be the nature of the finding. Unless it can be conclusively established against an accused that he is guilty, he is entitled to be proclaimed free from blemish and his honor cannot be sullied by any suspicion in Court's mind. Thus, in the present case each of the five acquitted persons can say, "I did not participate in the assault and I am innocent". If each one of them can say that, it cannot be held that some one or more of them were participants in the crime. The appellants cannot be held guilty for the action of some one or more of these five acquitted persons, in the face of the verdict of not guilty and acquittal of every one of those five persons.

27. As observed by Lord Campbell (one of the greatest Lord Chancellors England produced), in a case to be presently noticed an indictment to the effect that "A participated with either B or C" is not a good indictment nor will a finding to that effect be a good finding. and as observed by Bruce, J., in another case to be noticed hereafter, whether you acquit a man because you definitely hold that he did not participate in an offence or you hold that it is doubtful whether he participated or not on account of the evidence being insufficient, in both events the result is the same.

28. *In Rex v. Sudbury*[3], several persons were indicted for rioting. Two of them alone were found guilty and all the others were acquitted. It was held that the two could not commit a riot and could not be convicted for rioting. Holt, C.J., observed that if the indictment had been that the accused with divers other disturbers of the peace had committed the riot and the verdict had been that of the prosecuted persons only two could be found guilty, then the conviction could not be said to have been bad.

29. *In Rex v. Thompson*[4], one Thompson was indicted for conspiring with Tillotson and Maddock and other persons to the jurors unknown. The evidence was confined to Thompson, Tillotson and Maddock; and the jury were of opinion that Thompson conspired with either Tillotson or Maddock, but said that they did not know with which. Tillotson and Maddock were thereupon both acquitted. It was held that Thompson was entitled to be acquitted also. In the course of his judgment Lord Campbell, C.J., observed :

> "It is understood on both sides that no evidence has been taken applicable to any one but Thompson, Tillotson or Maddock. Tillotson and Maddock having been acquitted, the verdict against Thompson alone cannot be supported. It cannot be denied that, where the indictment is only that two defendants conspired together, the acquittal of one involves the acquittal of the other. Prima facie, therefore, at least where the indictment is that three defendants conspired, the acquittal of two involves the acquittal of the third for, when the jury declare that neither of those two conspired with the third, it is difficult to see how the third can have conspired

[3] 88 ER 1309 : (12 Mod 262)
[4] (1851) 117 ER 1100 : 16 QB 832

> with the other two, or with either of them. The only mode which occurred to me of supporting the indictment under the circumstances of this case was by taking the verdict to be, in effect, that Thompson had conspired with Tillotson or, Maddock, but the jury did not know with which. But that would be, I think, a bad finding. I cannot conceive how, if an indictment to that effect would be bad, such a special verdict could be good. But then it is said that the verdict supports the indictment, inasmuch as this charges Thompson to have conspired with other persons unknown. But I find it difficult to say that Tillotson or Maddock can fall within the category of 'other persons'; that could not be the meaning of the grand or petty jury."

30. *In King v. Plummer*[5], Plummer and two other persons were indicted together upon an indictment alleging a conspiracy between the three persons to defraud the prosecutors. It was not alleged that there were any other unknown persons in the conspiracy. Plummer pleaded guilty to the charge of conspiracy. The other two pleaded not guilty and they were acquitted. Plummer was convicted upon his plea of guilty. It was held that the conviction of Plummer was bad.

Bruce, J., at p. 347 observed :

> "I think that the statement in Chitty's Criminal Law, Edn. 3 Vol. III, p. 1141, is correct, and is fully supported by the authorities. The statement is as follows : and it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him. .....As to the note by Mr. Greaves in Russell on Crimes, Edn. 4, Vol. III, p. 146, referred to in the judgment of Wright, J., where it is suggested that a verdict of not guilty is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. If it is to be applied at all, it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that, if two persons are tried together upon a charge of conspiracy with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted."

31. In *Sadho v. Emperor*[6], Bajpai, J., had a case where the finding of the Sessions Judge was that more than five persons took part in the riot but he convicted less than five persons and acquitted the rest of the accused. It was held that the conviction of less than five persons was not illegal under Section 147, Penal Code. It was a case in which there were no unidentified persons named as participators in the riot. His Lordship observed :

> "In the present case, however, the judgment of the Court below satisfies me that he

[5](1902) 2 KB 339: (71 LJKB 805)
[6]1934 ALJ 640: (AIR 1934 All 881 : 35 Cr LJ 1494)

> was of the opinion that more than five men undoubtedly took part in the riot. The three men who have been convicted on each side and the two dead men also took part in the riot and the feeling of the learned Judge was that some of the others who were named in the cases were also involved in the offence, but as is very common in these cases some innocent persons might have been roped in, the learned Judge adopted certain sure tests for convicting the appellants. He, however, was undoubtedly of the opinion that more than five persons were involved on each side. I am, therefore, of the opinion that there is no force in the plea that an offence under Section 147, Penal Code is not made out."

The learned Judge's attention was not drawn to the decision in *Rex v. Thompson, (1851-117 ER 1100 : 16 QB 832) (ubi supra)* and although he was referred to the case of *King v. Plummer*[7], his Lordship's attention was not drawn to the passage from Bruce, J.'s judgment quoted above,

wherein he discusses the effect of a verdict of not guilty even if the verdict is based on the ground of benefit of doubt having been given to the accused.

32. In *Ram Rup v. Emperor*[8], Waliullah, J., (now My Lord the Acting Chief Justice), had a case before him in which seven parsons were put on trial before the Sessions Judge for offences under Sections 147 and 323, read with Section 149, Penal Code. The Sessions Judge acquitted five persons giving them the benefit of doubt and convicted the remaining two. His Lordship held that the remaining two persons could not be convicted under Section 147 as well as under Section 323 read with Section 149, Penal Code. It was observed :

> "The entire prosecution evidence in the case has been laid before me and it is clear from that evidence that not more than seven persons in all and one Ram Nagina who is dead were alleged to have participated in the occurrence at one stage or the other. There is no suggestion even anywhere in the evidence that the number of assailants who took part in the occurrence was more than seven, namely, the seven persons who were put upon their trial. Under these circumstances it is impossible to hold, on the one hand, that five of the accused persons who were acquitted by the learned Sessions Judge were not guilty of the offences charged and at the same time to hold that those very five persons were in a sense participating in the crime so that the remaining two, namely, Ram Rup and Shyam Narain appellants be held guilty under Sections 147 and 323 read with Section 149, Penal Code. To my mind it would be utterly illogical and also unsound in law to hold that the other five were not guilty of the offences charged but that they were there for a subsidiary purpose, namely, for the purpose of convicting the remaining two of riots and of the offence of simple hurt under Section 323 read with Section 149, Penal Code. The learned Assistant Government Advocate has referred me to a ruling reported in *Emperor v. Ram Adhin Singh*[9], in support of his contention that even after the acquittal of five of the men tried jointly along with the appellants the remaining two could be convicted of an offence under Section 147, Penal Code and also of the offence under Section 323, read with Section 149, Penal Code. I have perused the ruling mentioned above. To my mind the facts of that case were wholly

[7](1902-2 KB 339: 71 LJKB 805) [9] AIR 1931 All 439

[8]1944 ALJ 447: (AIR 1945 All 31: 46 Cr LJ 198)

> distinguishable from the facts of the present case. The
> principle laid down in that case can be applicable to my mind only to cases where evidence discloses that in addition to the men who were actually put upon their trial there were others, known or unknown, who were not before the Court. In such a case it is perfectly clear that the fact that some of the accused are acquitted with the result that those convicted constitute less than five in number would not necessarily mean that the convicted persons were participants in the crime in which all the culprits numbered less than five."

I respectfully agree with these observations.

33. An examination of these cases leads me to the following conclusions : (1) Where the finding is that there were several persons, some of them identified and some of them unidentified, who inflicted the injuries, and the Court convicts some of the identified persons and not all, then the convicted accused may be held guilty for the action of the unidentified persons. (*Rex v. Sudbury*[10], Where there are no unidentified accused, and out of the accused persons some are acquitted on the finding that it is doubtful whether any one of them were present at all, then the remaining accused, who are convicted cannot be convicted of any supposed action of the persons acquitted. The reason is that you cannot convict a person on the ground of constructive liability for the action of a person or persons, whether identified or unidentified, whose complicity is doubtful or has not been established. *Rex v. Sudbury*[11], *Rex v. Thompson*[12], *King v. Plummer*[13], *Ram Rup v. Emperor*[14], Where there are no unidentified persons participating in an incident, but out of the accused some are acquitted on the finding that it is not certain whether all the acquitted persons were present, but it is held that some of them were certainly present, though it cannot be ascertained as to who those persons were, even in such a case the convicted accused cannot be held guilty of what was done by the unidentified persons among those who have been acquitted. *Rex. v. Thompson*[15], The contrary opinion of Bajpai, J., in *Sadho's case*[16], is, it is respectfully submitted, not correct. The present case falls within the second of these propositions.

34. In my opinion, therefore, in the present case it is impossible to convict the two appellants of the offence of murder read with Section 34, Penal Code. They can only be convicted under Section 323, Penal Code.

35. I would accordingly allow this appeal, set aside the appellants' conviction under Section 302/34, Penal Code and sentence them to one year's rigorous imprisonment under Section 323, Penal Code.

BY THE COURT

[10]88 ER 1309: (12 Mod 262) [12](1851-117 ER 1100 : 16 QB 832) [13](1902) 2 KB 339 : (71 LJKB 805)
[11]88 ER 1309 : (12 Mod 262)
[14]1944 ALJ 447 : (AIR 1945 All 31 : 46 Cr LJ 198)
[15](1851) 117 ER 1100 : (16 QB 832)
[16](1934 ALJ 640 : AIR 1934 All 881 : 35 Cr LJ 1494)

36. In view of the difference of opinion between us, the case be laid before another Judge for opinion under Section 429, Criminal Procedure Code [In view of the difference of opinion, the case was referred to Wanchoo, J., who delivered the following opinion.]

Wanchoo, J.

37. This appeal by Harchanda and Babu has been referred to me for opinion because of a difference between my brothers, Raghubar Dayal and Agarwala, JJ. (His Lordships narrated the facts of the case and described the wounds and injuries on the deceased and then proceeded :) 38 and 39. Five of the seven accused persons other than the appellants said that they were not present when the incident took place and took no part in it. Babu and Harchanda appellants set up a counter-story which was to the effect that Atar Singh wanted a way, for his cart to pass, in front of the house of these two. There was no cart-way there from before and these two refused to cut down their chabutra in order to oblige Atar Singh. Thereupon Atar Singh, who was a Zamindar, cut down their chabutra and attacked Babu with a lathi. Babu fell down injured. Atar Singh's nephew, Chandrapal, also came up armed with a spear. Babu admitted that he had used his lathi in self-defense before he had fallen down. Harchanda said that he was also there. When Chandrapal came with a spear and was about to attack Babu, Harchanda snatched it from Chandrapal and used it in self-defence.

40. The learned Sessions Judge did not believe the story put forward on behalf of the defence. He accepted the prosecution version, on the whole, as correct, but could not believe that all the seven persons, accused before him, had taken part in this fight. He was of opinion that as there were only three injuries, which could have been caused by lathis, on the body of Atar Singh, he could not have been attacked by as many as five persons with lathis. He was further of opinion that the two incised wounds were, in all probability, caused by a spear and, therefore, it was very doubtful whether any sword had been used. Eventually, therefore, he came to the conclusion that it was very doubtful if anybody excepting the present two appellants had taken part in this affair. He, therefore, gave the benefit of the doubt to the remaining five appellants and convicted only the present appellants. However, he held that of the two appellants, Babu was armed with a lathi and Harchanda with a spear and, therefore, held these two appellants responsible for the five injuries which had been caused to the deceased and convicted them under Section 302, Penal Code, read with Section 34 of the same Code.

41. The difficulty, in this case, has arisen because of the finding of the learned Sessions Judge that the incised wounds on the body of Atar Singh were caused by Harchanda with a spear. The prosecution evidence definitely was that Harchanda had a lathi and not a spear and if the prosecution story was to be believed (as was apparently done by the learned Sessions Judge), the incised wounds could not have been caused by Harchanda. The learned Sessions Judge, in coming to the finding that Harchanda had a spear, accepted a part of the statement of Harchanda, even though it was in conflict with the prosecution evidence. I am of opinion that it was not open to the learned Sessions Judge, when he disbelieved the version given on behalf of the defense, to accept a part of the defense story which was in direct conflict with the evidence for the prosecution.

42. Both the learned Judges of this Court, who heard the appeal, have apparently accepted that

the incident took place in the manner alleged by the prosecution and not in the manner alleged by the defence, because the two judgments show that the theory of private defense of person set up by the defense has not been believed. They, however, disagreed on the question whether these two appellants could be convicted under Section 302, Penal Code, one of them being of the opinion that they could be so convicted and the other holding that they could only be convicted under Section 323, Penal Code.

43. In order to determine the question whether the appellants are guilty under Section 302 or Section 323, Penal Code, the cause of death has to be discovered. The Civil Surgeon's opinion was that death was due to haemorrhage and shock caused by the injuries and also to the distention of the abdomen on account of peritonitis. The latter reason obviously refers to the two incised wounds which were caused to Atar Singh. The first reason refers both to the incised wounds as well as to the contused wound and contusion found on his head. Unfortunately, however, the Civil Surgeon was not asked whether the two injuries on the head alone could have resulted in death. There was haemorrhage under the injuries and congestion of the brain, but there was no fracture of the skull below these injuries. In these circumstances, it would certainly not be possible to say that the death of Atar Singh could be due only to the two injuries found on his head.

44. As it cannot be said that Atar Singh's death was due only to the two injuries found on the head, the question arises whether these two appellants can be held responsible for the two incised wounds which obviously contributed a great deal towards causing the death of Atar Singh. The view taken by one of the learned Judges is that even if death could not be due only to the two injuries on the head, the appellants alone must be held responsible for causing all the injuries, including the incised wounds, to Atar Singh on the reasoning that as there were only seven persons concerned in the affair and five of them had been held not to be guilty, the remaining two must have been responsible for all the injuries. The difficulty, which I feel in accepting this view, is that it is contrary to the evidence for the prosecution in as much as it predicates that one of the two appellants must have been armed with a sharp-edged weapon. In a criminal trial, it is for the prosecution to prove its case beyond all reasonable doubt and the prosecution cannot expect a conviction on a premise which is directly in conflict with the prosecution case. The prosecution case definitely being that the two appellants were armed with lathis, the Court cannot be expected to hold that one of them was armed with a spear, simply because one of them said, while pleading self-defense, that he snatched the spear from the hands of some one on the prosecution side and used it in self-defense. That story of self-defense having been disbelieved, there was no one on the prosecution side who was armed with a spear and from whom that spear could have been snatched. It is not possible to accept only a part of the statement of one of the appellants to the effect that he had snatched a spear from some one, when that is in direct conflict with the prosecution case.

45. The same learned Judge has also taken an alternative view and referred to the case of *Sadho*

v. Emperor, reported in[17] In that case, a definite number of persons were prosecuted for rioting and murder. The Sessions Judge came to the conclusion that it could only be said with certainty that there were four persons who took part in the rioting. He, therefore, acquitted the remaining persons and convicted only three of them, the

[17]1934 ALJ 640 : (AIR 1934 All 881 : 35 Cr LJ 1494)

fourth being dead. It was then urged that as the number of persons, who took part in the fight, was less than five, there could be no conviction for rioting. It was, however, held at p. 641 as follows :

> "If the finding of the learned Judge is that more than five persons on each side took part in the riot, the mere fact that on the evidence he is not able to convict five persons on each side would not result in the acquittal of the convicted persons also under Section 147, Penal Code. The finding in the present case undoubtedly is that there were more than five persons on each side."

46. In a later case, *Ram Rup v. Emperor*[18]*,* which was also a single Judge case, the facts were that seven persons were put on their trial for rioting. It was not said that any unknown persons besides these seven had also taken part in the riot. Five of them were, however, acquitted, while the remaining two were convicted. In this case, though the learned Judge did not refer to the case of *Sadho v. Emperor*[19]*,* he obviously differed from the principle of that case when he observed as follows at p. 448 :

> "To my mind it would be utterly illogical and also unsound in law to hold that the other five were not guilty of the offences charged but that they were there for a subsidiary purpose, namely, for the purpose of convicting the remaining two of riot and of the offence of simple hurt under Section 323 read with Section 149, Penal Code."

It seems to me that of the two views, the latter one is more correct and in consonance with cases decided by English Courts.

47. In the case of *Rex v. Sudbury*[20]*,* more than five persons were prosecuted for rioting. Two of them were found guilty and all the others were acquitted. It was then held that two persons could not be guilty of rioting. Holt, C.J., however, pointed out that if the indictment had been that the accused, with other unknown persons totalling more than five, had committed rioting and had been convicted, the conviction would have been upheld.

48. In *King v. Plummer*[21]*,* three persons had been prosecuted for obtaining money by false pretences and also for conspiracy. Plummer had pleaded guilty to the charge of conspiracy, while the other two had pleaded not guilty on all charges. The other two who had pleaded not guilty were acquitted, but Plummer was convicted of conspiracy upon his plea of guilty. It was then held that the conviction of Plummer was bad. The reason for the acquittal of Plummer, in spite of

the plea of guilty, was that one person alone could not be guilty of conspiracy. Bruce, J., at page 347 observed as follows :

> "..... If two persons are tried together upon a charge of conspiracy with one another, and one is acquitted by the jury and the other convicted the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to

[18]1944 ALJ 447: (AIR 1945 All 31 : 46 Cr LJ 198)
[19]1934 ALJ 640: (AIR 1934 All 881 : 35 Cr LJ 1494)
[20]88 ER 1309 : (12 Mod 262)
[21]*(1902) 2 KB 339 : (71 LJKB 805)*

> establish the charge against the person who was acquitted."

It seems to me, therefore, that the view taken in the later case of this Court, *Ram Rup v. Emperor*[22], is the correct view to adopt and the part, if any, said to have been played by those acquitted cannot be taken into account in determining the guilt of the remaining persons who have been convicted.

49. This brings me back to the contention that if the five persons, who had been acquitted in this case, are held not to have taken part in this incident, the logical view to take is that all the injuries were caused by these two appellants. The force of logic behind this view cannot go unnoticed. But the difficulty in accepting this view is that it goes against the principles of criminal justice where, as I have already pointed out, it is for the prosecution to establish its case against an accused person beyond all reasonable doubt. Therefore it seems to me that the conclusions on the basis of such a logical view, if they are against the principles of criminal justice, cannot be accepted to the detriment of an accused person. I am, therefore, of opinion that, in this case, the prosecution, having come forward with a definite story that these two appellants were armed only with lathis, cannot ask for a conviction on a supposition based on the inference that one of them must have been armed with a spear. Nor can the prosecution take advantage of a part of the statement of one of the appellants to the effect that he was armed with a spear when it has been held that the story of self-defense put forward, on behalf of the appellants, was false and when that statement is in direct conflict with the prosecution evidence. Under these circumstances, on the acquittal of five of the accused persons and in view of the direct evidence of the prosecution that these two appellants were armed only with lathis, they can only be convicted for causing injuries with lathis. As it is not known for certain that the lathi injuries alone were responsible for the death of Atar Singh, the appellants can only be convicted under Section 323, Penal Code.

50. I, therefore, agree with the order proposed by my brother, Agarwala J. I am sorry that the murder has gone partly unpunished in this case. But the fault lies, in the first place, perhaps, with the complainant who might have roped in more persons than those who actually took part in the assault and secondly with the rather curious findings of the learned Sessions Judge.

51. Let this opinion be laid before the Bench concerned.

Raghubar Dayal and Agarwala, JJ.

52. In view of the opinion of the third Judge of this Court, we allow this appeal to the extent that the conviction of the accused-appellants under Section 302, read with Section 34, Penal Code, is set aside and, in lieu of it, the appellants are convicted of the offence under Section 323, Penal Code. Their sentence is reduced from transportation for life to one year's rigorous imprisonment. This one year will count from the date of conviction, that is, 16th February 1948. If they have already served out their sentence, they would be released forthwith.

Appeal allowed.

[22]1944 ALJ 447 : (AIR 1945 All 31 : 46 Cr LJ 198)