

ALLAHABAD HIGH COURT

Gulab

Vs.

State (Allahabad)

Cr. A. No. 611 of 1949

(Sankar Saran, Harish Chandra and Bind Basni Prasad, JJ.)

04.10.1950

JUDGMENT

Sankar Saran, J.

1. The following two questions have been referred to us by a Bench for our decision :

"1. An act is alleged to have been committed by a number of specified persons, five or more in number, in furtherance of the common intention of all of them. They are prosecuted for rioting and for the commission of the alleged act in view of the provisions of Section 149, Penal Code. The Ct. acquits all except the appellant giving them the benefit of the doubt. At the same time its definite finding is that the appellant was associated with some at least of those acquitted persons in the commission of the alleged act. It accordingly convicts the appellant of the commission of the alleged act applying the provisions of Section 34, Penal Code. Can such conviction be upheld ?

"2. Whether in such a case it is open to the appellate Ct. to find, there being no Govt. appeal against the acquittal of such acquitted persons, that, although it cannot interfere with such acquittal, such persons or some of them had been wrongly acquitted and had in fact taken part in the commission of the alleged act in association with the appellant and on this ground hold that the appellant was rightly convicted ?"

2. The facts of the case so far as they are necessary for the purposes of this reference very briefly are that a serious riot took place in which one Bhoja lost his life and several persons received grievous and simple hurts. Fifteen persons were on their trial, some under section 147 and Section 302 read with Section 149, Indian Penal Code and others under section 147 and Sections 323 and 324 read with Section 149, Indian Penal Code. The learned Ses, J., however, acquitted all of them except one man Gulab whom he convicted of an offence under section 302 read with Section 34, Indian Penal Code. In doing so he came to the following finding :

"There is no doubt that Gulab who had been named by all the prosecution witnesses was certainly one of the assailants. His name was mentioned on the first opportunity in the telegram given by Banwari soon after the assault. In my opinion, the prosecution witnesses's evidence about the participation of Gulab accused in assaulting Bhoja must be believed. I find that Gulab was one of the assailants of Bhoja."

3. The learned Ses., J., gave the other appellants the benefit of doubt and observed as follows :

"The result is that it has not been possible for the prosecution to conclusively prove who were the other associates of Gulab, but there is no doubt that there were such associates since Gulab had only a sword and there were only two injuries on the person of the deceased which could have been caused by such a weapon and which were not mainly responsible for his death. The wounds with the sword were not sufficient to cause by themselves his death, which was caused by multiple injuries inflicted on him by Gulab and others. The question, therefore, is what offence has been committed by Gulab. He cannot be said to have committed an offence under section 302, Indian Penal Code, alone since the injuries caused by him were not in themselves sufficient to cause the death of Bhoja, but if it is proved that he was a member of an unlawful assembly the common object of which was to beat Bhoja and Bhoja was "killed by the unlawful assembly or any member thereof in prosecution of that common object, Gulab is certainly guilty of an offence under section 302, Indian Penal Code, read with Section 149, Indian Penal Code. However it has not been possible for me to come to a definite conclusion that the other associates of Gulab were at least four in number. In the absence of such evidence it cannot be said that there was an unlawful assembly and Gulab was a member thereof."

4. For the conviction of Gulab, however, the learned Ses. J., came to the following conclusion ;

"In my opinion, therefore, the death of Bhoja was due to his beating by Gulab and his confederates who had a common intention to cause his death or to cause such "bodily injuries to him as were likely to cause his death. He is, therefore, guilty under section 302, Indian Penal Code, read with Section 34, Indian Penal Code"

5. The findings in this case amount to this that Gulab was certainly in the fight in which more persons than one participated. The number of the participants might or might not have been five. Section 147, Indian Penal Code, cannot apply unless it can be established that the participants were five or more in number, but Section 34 would apply if the finding of the Ct. that including Gulab there were persons more than one in the fight and that death was caused in furtherance of the common intention of them all, is correct. As the learned Ses., J., has acquitted the appellant of an offence under section 147, all we are concerned with is the question of applicability of Section 34 on the findings arrived at by him.

6. This case would have presented no difficulty upon the authorities had not all the participants in the fight been named. If there were some unspecified persons in the fight, the position would have been simple and it could have easily been held that Gulab along with certain unknown persons was responsible for the offence. In this case, however, the position is that all the participants were named and the learned Ses, J., has not been able to find as a fact which of those named persons barring Gulab were actually engaged in the fight. That Gulab had companions who participated in the fight has been found by the Judge, but he is not able to make up his mind as to who they were. It is a case where the Judge has not held that the prosecution evidence with regard to the complicity of the persons named is disproved. All that he has found is that the case against the individual accused persons whom he has acquitted is not proved. Had the Judge said that these persons were not there, the position would have been different. He has, however, held that it is doubtful whether they were there. In these circumstances it cannot be asserted that these men were not in the fight. The effect, of course, of the acquittal is that they are not guilty, but I am unable to subscribe to the view that they can be said to be wholly innocent.

7. It frequently happens that in a Ct. of law an accused person is acquitted "without a stain on his character. : On the other hand, there are acquittals in which it is held that "upon a consideration of all the circumstances it is safe to give the accused the benefit of doubt."

8. Our attention has been invited to a few English and Indian cases on the subject. The latest is an unreported case of this Ct., *Gumani v. Rex*¹, in which there was a difference of opinion between the learned Chief Justice and Dayal, J. The case was referred to me and I adopted with approval a passage from the judgment of the learned Chief Justice upon which I shall rely. The passage is reproduced below :

"Where the prosecution has mentioned the names of all those who formed an unlawful assembly and the Ct. is satisfied that "only some of them, less than five, are guilty and the rest are not guilty, then Sections 147 and 149 cannot be applicable. If, however, the Ct. is satisfied as regards the identity of some, but is not able to fix the identity of the others, though it is satisfied on the evidence that there were more than five persons, to my mind, to such a case also Sections 147 and 149 would be applicable."

9. The controversy has arisen in this Ct. on account of an apparent difference of opinion between the judgments of this Ct. in *Sadho v. Emperor*², and *Ram Rup v. Emperor*³, The facts in both the cases were similar in that in both cases all the assailants had been specified and in neither case was it said that there were any persons other than those who had been recognized or identified in the riot. In Sadho's case Bajpai, J., expressed himself in a very general manner and observed 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 could not result in the acquittal of the convicted persons also under section 147, Indian Penal Code. The finding in the present case undoubtedly is that there were more than five persons on each side." In the latter case Waliullah, J., laid emphasis on the fact that the assailants seven in number had all been named and he came to the following conclusion : ".....it is impossible to hold on the one hand, that five of the accused persons who were acquitted by the learned Ses, J., were not guilty of the offences charged and at the same time to

¹ Cri. Appeal No. 413 of 1949 ³(1944 ALJ 447).

²(1934 ALJ 640)

hold that these very five persons were in a sense participating in the crime.....To my mind it would be utterly illogical and also unsound in law to hold that the other five men were not guilty of the offences charged but they were there for a subsidiary purpose, mainly for the purpose of convicting the remaining two of the riots and of the offence of simple hurt under section 323 read with Section 149, Indian Penal Code"

The learned Judge consideration a Bench case of this *Ct. Emperor v. Ramadhin*⁴ and distinguished that case from the one which he was considering. In Ramadhin's case the evidence disclosed that in addition to the men who were actually on trial, there were others, known or unknown, who were not before the Ct. and it was held that in such circumstances the conviction under section 147 would be permissible.

10. As I have pointed out above, the fact that all the assailants had been named was not brought out in the judgment of Bajpai, J. When he laid down the general proposition of law quoted above. His decision was more on the lines of Ramadhin's case, although that case was not mentioned by the learned Judge and he did not consider the distinction which has been pointedly brought out in the judgment of Waliullah, J. The proposition of law laid down in Ramadhin's case has not been disapproved by Waliullah, J., and one might, therefore, say that there is no vital difference between the earlier case of Sadho decided by Bajpai, J., and the later case of Ram Rup decided by Waliullah, J.,

11. These two cases have; however, been discussed at length in *Harchanda v. Rex*⁵, where, upon a difference of opinion between Dayal and Agarwala, JJ., the case was referred to Wanchoo, J. In this case seven persons were charged for offences under section 148 and 302 read with Section 149, Indian Penal Code. It was not the prosecution case that there were any unidentified persons amongst the assailants. The learned S.J., had given the benefit of doubt to five accused and convicted the two appellants under section 302 read with Section 34, Indian Penal Code. Dayal, J., also in discussing the case of *Sadho v. Emperor (ubi supra)* and *Ram Rup v. Emperor (ubi supra)* does not seem to have found much of a contradiction between these two cases. Referring to Sadho's case he observed.

"It was held that if the Ct. finds that there were at least five persons who took part in the transaction, the Ct. 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 Ct. 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

⁴(AIR 1931 All 439)

⁵1950 ALJ 220

incident. As 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 have 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 are alleged to have been caused by the persons who had been acquitted "

Agarwala, J., on the other hand was of the opinion that the learned Ses, J., had not held that "the incised wounds were caused by one or the other of the five accused acquitted by him. Although it is true that the learned Ses, J., 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." Having expressed himself thus, the learned Judge went on to observe that inasmuch as no Govt. appeal had been filed against the acquittal of the other accused :

"Therefore, we have to take the findings of the learned Ses., J., so far as those five accused are concerned, as correct."

He has emphasized this fact by subsequently again referring to it in his judgment in the following terms :

"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 Ses., J., so far as it concerns those accused, we cannot hold that either Durga Das or Sukhoir was responsible for inflicting the incised wounds : and since it was not the prosecution case that there was some unknown persons 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 learned Judge went on to observe as follows :

"When the evidence on the 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 of 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 honour cannot be sullied, by any suspicion on Ct.'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."

In support of his view the learned Judge placed reliance upon certain English cases. He relied particularly upon a dictum of Bruce, J., in *King v. Plummer*⁶, which runs as follows :

"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 persons 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."

The learned Judge also referred to another case with approval, *Rex v. Thompson*⁷, That was a case of conspiracy between Thompson and one other, either Tillotson or Maddock who were both acquitted. Lord Camphell, C.J., in the course of his judgment observed :

"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 with the other two, or with either of them."

12. Bajpai, J., in his judgment distd. the case of a conspiracy and observed that it "requires a clear mention of the conspirators and if on the paucity of evidence an acquittal follows regarding the rest of the accused it is not possible to convict a single man on a charge of conspiracy." In Thompson's case as the result of the acquittal of Tillotson and Maddock only one man was left and he could not have conspired by himself. As a matter of fact that acquittal in Plummer's case was upon the view expressed by Brace, J., that when two persons are tried together upon a charge of conspiracy with one another and one is acquitted the conviction of the other obviously cannot stand.

13. Wanchoo, J., to whom this case was referred upon a difference of opinion, found himself in general agreement with the view expressed by Agarwala, J. He considered that there was a difference between the case of *Sadho v. Emperor (ubi supra)* decided by Bajpai, J., and the case of *Ram Rup v. Emperor*, decided by Waliullah, J., and chose the view expressed in *Ram Rup v. Emperor (ubi supra)*.

14. Having given respectful consideration to the views expressed by the learned Judges of this Ct. I have come to the conclusion that there is no reason for me to alter the following view that I had expressed in *Gumani and Peetam v. Rex*⁸

⁶(1902) 2 KB 339

⁸(Cr. Appeal No. 413 of 1949)

⁷(1851) 117 ER 1100; 16 QB 832

"Where the prosecution has mentioned the names of all those who formed an unlawful assembly and the Ct. is satisfied that only some of them less than five, are guilty and the rest are not guilty, then Sections 147 and 149 cannot be applicable. If, however, the Ct. is satisfied as regards the identity of some, but is not able to fix the identity of the others, though it is satisfied on the evidence that there were more than five persons, to my mind, to such a case also Sections 147 and 149 would be applicable."

In the view that I take, I would answer the first question in the affirmative.

15. With regard to the second question, I consider it necessary to refer to Section 423 (1) (b), Criminal Procedure Code which deals with the powers of an appellate Ct. in an appeal from a conviction which runs as follows :

"In an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Ct. or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence, but subject to the provisions of Section 106. . ."

It would thus appear that it is open to an appellate Ct. to uphold a conviction not only upon the findings of facts arrived at by the Ct. below but even after altering the findings of the Ct. below.

In this connection I would refer to the decision of a F.B. of this Ct. *Zamir Qasim v. Emperor*⁹, In this case, after an elaborate discussion of the authorities, the F.B. held by majority that the appellate Ct. could alter a finding of acquittal into one of conviction even though no appeal has been preferred by the State Govt. subject, of course, to the limitation that the appellate Ct. cannot enhance the sentence imposed by the trial Ct. The mere omission of the State Govt. to appeal against an order of acquittal does not, in all cases, give finality to such finding and it can be altered by the H.C. There is no limitation imposed upon the powers of the Ct. to alter any finding so long as it does not involve an enhancement of sentence. It seems to me that in the words of Sale, J., in *Bawa Singh v. The Crown*¹⁰, alteration means "change in form, without changing the underlying character of the thing to be changed," and in that view there does not seem to be, in my judgment, any prohibition upon the Ct. against the alteration of a finding of acquittal into one of conviction. In the words of Iqbal Ahmad, C.J.

"The power to 'alter the finding' is not circumscribed by any words or limitation and as there is nothing in Clause (b), of Section 423, to prohibit the appellate Ct. from going behind a finding of acquittal, the answer to the question (whether a Ct. of appeal is empowered under section 423 (1)(b), (2) to alter a finding of acquittal into one of conviction).....must in my opinion be in the affirmative."

16. It would thus appear that there is nothing to bar the Ct. from holding that the acquittal of some of the accused persons was wrong and that they or some of them had taken part in the crime in assocn. with the appellant and that, therefore, the conviction of the

⁹ AIR 1944 All 137

¹⁰ ILR (1942) Lah 129

appellant was correct.

17. For the reasons stated above, I would answer the second question also in the affirmative.

Bind Basni Prasad, J.

18. I had the advantage of going through the judgments of my learned brothers. I entirely agree with the answers which they propose to give to the two questions referred to this F. B. and desire to add the following :

19. The cases of *Sadho v. Emperor*¹¹, *Ram Rup v. Emperor*¹², and *Harchanda v. Rex*¹³, have already been discussed by my learned brothers in their judgments. In the first two cases learned Ses., J., had convicted the appellants for a certain substantive offence read with Section 149, Penal Code, whereas in the third one the appellants were convicted by the Ses., J., under section 302 read with Section 34, Penal Code. In *Gumani v. Rex*¹⁴, which has also been referred to by my learned brother, Sankar Saran, the appellants had been convicted under section 147 and 302 read

with Section 149, Penal Code. In the present case the appellant was prosecuted along with 14 other persons. Some of them were charged under section 147 and Section 302 read with Section 149, Penal Code and others under section 147 and Sections 323 and 324 read with Section 149, Penal Code. The appellant alone has been convicted and sentenced to transportation for life under section 302 read with Section 34, Penal Code. The findings of the learned Ses, J., as regards the remaining fourteen, who were acquitted, have been quoted in extenso by my learned brother, Justice Sankar Saran. In substance, the finding is that some out of these fourteen were certainly associated with the appellant in the commission of the offence. It was not possible, however, to say definitely whether the number of these participants along with the appellant was five or more, hence Section 149, Penal Code could not be applied. While the learned Ses., J., was definite that some of the acquitted persons were the confederates of the appellant in the commission of the offence, on the evidence produced before him he could not fix them. It was in these circumstances that he acquitted the remaining fourteen. It may be noted that it was not the prosecution case that any unidentified persons, who were not before the Ct. also took part in the commission of the offence. It was the definite case of the prosecution that only the 15 named persons took part in the offence.

20. There is a certain resemblance between Sections 34 and 149, Penal Code. Both the sections deal with liability for constructive criminality. Both deal with combinations of persons who become punishable as sharers in an offence. They overlap to some extent. The difference between the two sections is that Section 149 is applicable only where an offence is committed by any member of an unlawful assembly whereas for the application of Section 34 the existence of an unlawful assembly is not necessary. Another distinction between these two sections is that under section 34 a criminal act must be done by several persons "in furtherance of the common intention of all", whereas under section 149 the

¹¹1934 ALJ 640

¹³1950 ALJ 220

¹²1944 ALJ 447

¹⁴ cri. Appeal. No. 413 of 1949

mere membership of an unlawful assembly, any member of which commits an offence "in prosecution of the common object of that assembly", is punishable. In so far as the cases under section 149, Penal Code lay down the principle of constructive criminality, they are applicable to the present case also in which we have to consider the provisions of Section 34. There has recently been a decision of the F.C. also in *Kapildeo Singh v. The King*¹⁵, The following observations of Mukherjea, J., who delivered the judgment in that case are important :

"The essential question in a case under section 147 is whether there was an unlawful assembly as defined in Section 141, Penal Code, of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and even when it is possible to convict less than five persons only Section 147 still applies if upon the evidence in the case the Ct. is able to hold that the person or persons who have been found guilty were members of an assembly

of five or more persons, known or unknown, identified or unidentified."

21. The same principle is applicable to a case where a person has been charged for a substantive offence read with Section 34, Penal Code. The dictum laid down by the PC in Kapildeo Singh's case, *mutatis mutandis* would then read as follows :

"The essential question where a person is charged with a substantive offence read with Section 34, Penal Code, is whether or not a criminal act was done by several persons in furtherance of the common intention of all. The identity of the persons is a matter relating to the determination of the guilt of the individual accused and even when it is possible to convict one person only, Section 34 still applies, if upon the evidence in the case the Ct. is able to hold that the criminal act was done by some other persons also known or unknown, identified or unidentified, in furtherance of the common intention of all."

22. The view expressed by Bajpai, J., in *Sadho v. Emperor*¹⁵, and by Malik, C.J. and Sankar Saran, J., in Gumani's case (*ubi supra*) is in accord with the principle laid down by the F.C. in Kapildeo Singh's case. The observations of the F.C. mean that where several persons are charged for having jointly committed an offence, the case should be approached in the following manner : (1) Did several persons, no matter whether they are known or unknown, identified or unidentified, do the criminal act "in furtherance of the common intention of all"? The Ct. should first see whether there were more than one person. (2) If there were several such persons, Section 31, Indian Penal Code, will apply, even if only one of them is found guilty and others cannot be ascertained. Such others may be untraced or may even be among the acquitted persons. If however the Ct. finds that the criminal act was done by one person only, Section 34 will not apply. (3) The case of each individual accused should then be examined. If he participated, he will be guilty of the substantive offence read with Section 34. If he did not participate he will not be

¹⁵1950 SCJ 143

¹⁶1934 ALJ 640

guilty.

23. For application of Section 149, Indian Penal Code, the further question to be examined is whether or not there were five or more than five participants, any one of whom committed an offence in "prosecution of the common object" of all. If there were five or more than five, no matter whether known or unknown, identified or unidentified, Section 149, Indian Penal Code, will apply. The Ct. may be able to fix less than five, but if it is certain that five or more than five participated it must apply Section 149, Indian Penal Code, even though the unascertained persons may be among these whom it acquits on account of its inability on the evidence to fix them. The authorities are unanimous that if such unascertained persons are untraced, then Section 149 applies.

24. It will be noted that in Ram Rup's case the conviction of the appellants was maintained, but it was altered from one under section 147 and Section 323 read with Section 149, Indian Penal Code, to one under section 323 read with Section 34, Indian Penal Code. The case is distinguishable from the present one. In that case eight and only eight persons were alleged to have taken part in the commission of the offence. One of them died after the occurrence. Of the remaining seven, five were given the benefit of doubt and were acquitted. There was no definite finding of the Ses., J., that out of the acquitted persons any of them had participated in the commission of the offence. Waliullah, J., while discussing Sadho's case observed.

"To my mind the facts of that case were wholly 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 Ct."

In the present case, there is a definite finding that some of the accused who have been acquitted also did the criminal act along with the appellant in furtherance of a common intention of all, but the Ct. is not in a position to fix these confederates as they have been mixed with innocent persons. The generality of the principle laid down in Ram Rup's case and followed in Harchanda's case is modified by the observations of the F.C. in Kapildeo Singh's case.

25. I would, therefore, answer the first question in the affirmative.

26. The answer to the second question is concluded by the decision of the majority in the F.B. case of *Zamir Qasim v. Emperor*¹⁷, and I would answer it also in the affirmative, subject to the condition that the appellate Ct. cannot enhance the sentence imposed by the trial Ct.

Harish Chandra, J.

27. In view of the judgment written by my learned brother Sankar Saran, it is unnecessary

¹⁷ AIR 1944 All 137

for me to mention the facts of the case. The authorities seem to be agreed that when the finding of the Ct. is that an accused person committed a crime along with a number of others known or unknown who were not on trial, he may be convicted of an offence with the aid of either Section 149 or Section 34, Penal Code, according to circumstances. If, however, all the other persons who are alleged to have been associated with him in the commission of the crime were named and were on trial along with him, but were acquitted, the view taken in certain cases is that Section 149 or 34 cannot be brought into aid to find the accused guilty of any offence. Waliullah, J., observes in the case of *Ram Rup v. Emperor*¹⁸,

".... 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 328 read with Section 149, Indian Penal Code"

28. Agarwala, J., in his judgment in *Harshanda v. Rex*¹⁹, observes :

"When the evidence on record is conclusive against an accused, we hold that he is guilty. When it is conclusive in favour 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 honour cannot be sullied by any suspicion in Ct.'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."

29. With all respect my view is that the distinction that has been drawn between the two classes of cases mentioned above is not substantial. An accused person may be acquitted of an offence for a variety of reasons. In a conceivable case there may be a finding of fact against him that he had committed the crime, but he may still be acquitted because of certain defects in the manner in which the case was instituted or for want of sanction by the proper authority where such sanction was necessary before the institution of the case. An accused person may be acquitted in a case honourably and without any blemish on his character. It may also be otherwise. It not infrequently happens that although an accused person who is a public servant has been acquitted by a Ct. of law, still departmental proceedings are taken against him and he may be punished departmentally even on the findings of the very Ct. that acquitted him. The acquittal of an accused person in a case does not prevent another Ct. which may be trying another person in connection with the same crime from holding that such person had not been properly acquitted and to make

¹⁸1944 ALJ 447

¹⁹1950 ALJ 220

use of such finding in judging the guilt of the person accused before it.

30. Bajpai, J., has in the case of *Sadho v. Emperor*²⁰, favored the contrary view and the following is reproduced from his judgment :

"In the present case, however, the judgment of the Ct. below satisfies me that he 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."

31. To my mind the view taken by Bajpai, J., in *Sadho's* case is perfectly sound. Agarwala, J., in taking a different view of the matter was guided by certain authorities of the Courts in England.

32. In *Rex v. Sadbury*²¹, several persons were indicted for rioting. Two of them alone were found guilty while all the others were acquitted. It was held that the two could not commit a riot and could not be convicted of rioting. It does not however appear in what circumstances the other persons were acquitted in that case.

33. In *Rex v. Thompson*²², one Thompson was indicted for conspiracy with two others by name Tillotson and Maddock and certain other persons. The evidence, however, was that he had conspired with Tillotson and Maddock. The jury found Tillotson and Maddock not guilty but gave a verdict of guilty against Thompson. It was held that Thompson was entitled to an acquittal. Obviously, the jury had not indicated on what grounds they found Thompson guilty although they had acquitted Tillotson and Maddock. The Judge took into consideration the possible reason which may have led the jury to convict Thompson in spite of its having acquitted Tillotson and Maddock that Thompson had conspired either with Tillotson or with Maddock, but that the jury did not know with whom. In the view of the Judge this was a bad finding and the following is reproduced from the judgment :

"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

²⁰1934 ALJ 640

²²(1851) 117 ER 1100 : 16 QB 832

²¹88 ER 1309; 12 Mad 262

could not be the meaning of the grand or petty jury."

34. Bajpai, J., in *Sadho's* case, took the view that a conspiracy was different from a riot and distd. that case. I, however, find myself unable to agree with the view expressed in that case. If the

finding distinctly was that Thompson had conspired with either Tillotson or Maddock, there is no reason why he should not have been convicted of conspiracy.

35. In the case of *King v. Plummer*²³, Plummer was prosecuted along with two other persons on an indictment of conspiracy. It was not alleged that there were any other unknown persons. Plummer pleaded guilty while the other two pleaded not guilty and were acquitted. Plummer was convicted upon his plea of guilty. It was held that the conviction of Plummer was bad. In that case Bruce, J., observed :

" 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."

36. As has been pointed out by Malik, C.J., in the case of *Gumani v. Rex*²⁴, these English cases are in fact not a proper guide in a matter of this nature. They were all jury trials and after the jury had found a number of accused persons not guilty, the conviction of others who could not have been found guilty except on a finding that they were associated in the commission of the crime with the other accused persons who were acquitted, could not be upheld inasmuch as the verdict of the jury would in no case specify whether while acquitting some of the accused persons it was of the view that at least some of them had taken part in the crime so as to justify the conviction of the accused person who was found guilty by it for the offence with which he had been charged along with the other accused persons. The following is reproduced from the judgment :

"The case of *King v. Plummer*²⁵, may also be mentioned, but there is great difference between a trial with the aid of a jury and a trial by the Judge. If the jury returned a finding of not guilty and if the Judge had not divided the question into two parts, (i) whether there were more than five persons who had taken part in the riot, and (ii) the persons named, or which of them, were there, it may not be possible to convict the accused under section 147. But where the question had been divided into two parts, and the jury returned a finding on the first part in favour of the prosecution and on the second part in favour of the accused that they were not satisfied about the identity of some of the accused, it would be difficult in such a case to hold that those whom the jury had held to be guilty could not be convicted of rioting."

²³(1902) 2 KB 339,

²⁵(1902) 2 KBD 339

²⁴ Cri. Appeal No. 413 of 1949

37. The observation of Agarwala, J., reproduced in an earlier part of the judgment would no doubt apply to an acquittal by a jury. For no reasons are given by the jury for holding the accused not guilty. But in a case where there is a clear finding that although the Ct. acquitted some of the

accused persons it was satisfied on the evidence that some of them had in fact taken part in the crime in assocn. with the convicted persons so as to attract the provisions of Section 149 or 34, such conviction ought not to be interfered with.

38. No doubt, an order of acquittal cannot be revsd. except in an appeal from such order. But an appellate Ct. has full liberty to maintain a conviction on grounds other than those upon which the conviction was based by the Ct. below and in doing so to alter its finding, if necessary, with respect to the other accused persons who may have been acquitted by it and to hold that the appellant who could not have been convicted except on a finding that he was associated with certain other persons in the commission of the crime had been rightly convicted.

39. I would therefore answer both the questions which have been referred by the Bench in the affirmative.

40. BY THE COURT :- Our answer to both the questions is in the affirmative.

41. Let the case be laid before the Bench concerned.

Reference answered.