CALCUTTA HIGH COURT

Adam Ali Taluqdar

Vs

King-Emperor

(Page, J.)

20.12.1926

JUDGMENT

Page, J.

1. Appeal No. 427 of 1926. This is an appeal by two persons, Adam Ali Taluqdar and Sher Gazi, who have been sentenced by the Sessions Judge of Barisal, agreeing with the unanimous verdict of the jury, to seven years rigorous imprisonment under the second part of Section 304, I.P.C.

2. The facts are as follows : There are two persons, Ekram Ali and Akkel Ali, who own a piece of land each having an eight-annas share in it. By arrangement Ekram Ali possessed the northern half and Akkel Ali the southern half. Akkel Ali is the husband of the sister of Ekram Ali. Ekram Ali mortgaged the land to Adam Ali Taluqdar, one of the appellants now before us, and Adam Ali was in possession. Then Akkel Ali sold the land, to Ekram Ali. Ekram Ali wanted to redeem the mortgage and tendered the money to Adam Ali. There were some disputes about the payment of the money, but Ekram Ali cultivated the land. On the 25th December 1925, Adam Ali, Sher Gazi and Abdul Gafur, who is the appellant in a connected appeal, and one Tahir Khan, brought anumber of reapers and proceeded to cut the coarse paddy grown on the northern half of the land by Ekram Ali and began to cut the paddy. Ekram Ali and his two brothers Adam Ali, Monta Ali and his cousin Mahammad, came to the spot. The two parties faced each other and Mahammad flung a spear at Tahir Ali which missed him. Abdul Gafur called out to the party to kill someone. Tahir Mahammad then struck Mahammad with his spear in the stomach and Sher Ali and Adam Ali also stabbed him. He fell down and died on the spot. The defence was that of innocence and enmity. Mr. Taluqdar has argued that Section 34 of the I.P.C. can have no application to the second part of Section 304 under which the appellants have been convicted. His argument is this:

3. The second part of Section 304 runs as follows: 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 without any intention to cause death or to cause such bodily injury as is likely to cause death.

4. Mr. Taluqdar argues that to apply Section 34 there must be a common intention and that as there was no common intention to cause death or such bodily injury as is likely to cause death because the definition of Section 304, Part 2, excludes such intention, Section 34 cannot apply.

The simple answer to this contention is this: that although to constitute an offence under Section 304, Part 2, there must be no intention of causing death or such injury as the offender knew was likely to cause death, there must still be a common intention to do an act with the knowledge that it is likely to cause death though without the intention of causing death. Each of the assailants may know that the act they are jointly doing is one that is likely to cause death but have no intention of causing death, yet they may certainly have the common intention to do that act. No one will dispute that such an act is a criminal act. Clearly Section 34 can apply to a case under Section 304, Part 2.

5. Our attention has been drawn to a decision of Mr. Justice Walmsley and Mr. Justice Mookerjee (Appeal No. 248 of 1924, decided on 19th August 1924). In that case there are the following remarks of Walmsley, J.: There is yet another objection to the charges and verdict. It is that Section 34, which is based on a common intention, cannot possibly be used with the second part of Section 304 which expressly excludes intention. Personally I do not think that it could be used with the first part either, except possibly in very rare cases. However, the point is that the jury have found the accused guilty of committing culpable homicide by doing an act with, the knowledge that they were likely to cause death, but without any such intention, in furtherance of a common intention. It is badly framed charge and the defective summing up that have led the jury to their illogical verdict.

6. With great respect to the learned Judge I am not quite able to discover whether he did or did not decide the point. He certainly does not discuss it or give any reason for his decision. But it is clear from a parusal of the judgment that the learned. Judge decided the case upon other considerations and that the decision of that case did not depend on the interpretation of Section 34. The learned Judge's remarks therefore on the applicability of 34 to Section 304, Part 2, may therefore be considered as obiter dicta.

7. Mr. Taluqdar next contends that Section 35 is the section that really applies. Section 35, I.P.C., simply makes it clear that where a number of persons join in an act which is criminal only by reason of its being done with a certain knowledge or intention, each person is liable for the act to the extent of his knowledge or intention; in other words, that the Court or jury have to consider what is knowledge or intention with which each person joined in the act, i.e., A and B boat C who dies. A intended to murder him and knew that the act would cause death. B only intended to cause grievous hurt and did not know his act would cause death or such bodily injury as was likely to result in death. A is guilty of murder and B of causing grievous hurt. This is no doubt correct, and it was no doubt incumbent on the Judge to charge the jury that they must consider with what knowledge or intention each person joined in the act. The learned Judge's summing up is a long and careful one. The law is dealt with by him carefully and at length. In dealing with Section 34 he points out that the act must be done with the common intention of all which must be gathered from the circumstances of the case. He also explains Section 304 very carefully and points out that to find them guilty under Section 304, Part 2, there must be the knowledge that the injury is likely to cause death, and although it is not put in so many words, I think it is to be inferred from the charge as a whole that it was put to the jury that they had to consider the knowledge with which each person acted,

8. Mr. Taluqdar next contends that the learned Judge never explained to the jury the law on the subject of the right of private defence. Now it is not for the Judge to explain to the jury questions

of law which do not arise on the facts or pleadings of the party. In this case the appellants themselves never pleaded that they acted in the exercise of the right of private defence. Their plea was a simple denial. It was presumably argued by their counsel that they were acting in the right of private defence. They themselves, however, so far as can be seen, never raised it and it cannot therefore be said to have ever been their case. If a person raise the defence that he acted in the exercise of the right of private defence, he must prove it. He must set forth the exact circumstances in which the acted to show that he was justified in what he did. It has no doubt been held that he may plead he was not there and [at the same time make out from the evidence of the prosecution witnesses that what he did was in the exercise of the right of private defence. But it seems to me that if there is absolutely nothing in the prosecution evidence to suggest that he was so acting, there is nothing to go to the jury. It is very difficult for the Judge to put to the jury what is really a hypothetical and nobody's substantial case. There are so many factors and circumstances which require to be proved to establish a right of private defence that it is difficult to see how it can be successful unless specifically pleaded. The Judge has always this difficulty that he never knows what in each case he has to put and it is very difficult for an appellate Court to discover what case he was asked to put to the jury on behalf of the accused when they themselves say nothing, or for an appellate Court to say that the accused's case of the right of private defence was or was not properly put for the simple reason that the appellate Court does not know what that case was. In the present case, however, the Judge does seem to have explained the right of private defence to the jury and I am not prepared to find on the facts proved or alleged that their explanation was not sufficient. The result is that this appeal must be dismissed and the-accused, if on bail, must surrender to serve out the remainder of their sentence. Appeal No. 442 of 1926.

9. This is the appeal by one Abdul Gaffur Panchayet who has bean convicted under Section 304, para. 2 read with Section 109 and sentenced to 2 years rigorous imprisonment and a fine of Rs. 50, in default to undergo a further term of six months rigorous imprisonment.

10. The facts of the case have been fully set forth in the connected Appeal No. 427 of 1926 and it is unnecessary to recapitulate them.

11. The case against the present appellant is that he instigated the two men Adam Ali and Sher Gazi to kill Mahammad Ali.

12. The instigation consisted in certain words which he used. Learned counsel, who has appeared for him, has contended that the Judge did not correctly explain to the jury the law of abetment. He contends that Abdul Gaffur has been convicted under Section 304 read with Section 109. Section 109 deals with the case in which the act was committed as a result of the abetment. Mr. Bose contends that it was Mahammad Ali who by throwing a spear at Taher Ali started the whole trouble and so it was not on account of the words used by Abdul Gaffur that Mahammad Ali was killed.

13. We have carefully considered the charge of the Judge to the jury and it is quite clear that he did put it to the jury to consider whether it was the appellant Abdul Gaffur who instigated the death of Mahammad and whether the death of Mahammad Ali was the result of the instigation. The concluding words of his charge on this point are: If the words uttered could not have been the main reason for the assault on the deceased he is entitled to be found not guilty.

14. The jury were left to put their own interpretation on the words used.

15. We have next been asked to consider the question of sentence. No doubt the appellant did nothing more then urge on the others, but the man who urges on others is often the real cause of the whole trouble and but for his urging nothing would have happened. We are not prepared to say that his sentence errs on the side of severity. His appeal is dimissed and, if on bail, he must surrender to serve out the remainder of the sentence.