PATNA HIGH COURT

State of Bihar

Vs

Rahim Nadaf

Death Ref. No. 9 of 1956, with Criminal Appeal Nos. 176 and 250 of 1956

(Ahmad and Sinha, JJ.)

03.07.1956

JUDGMENT

Ahmad, J.

1. These nine appellants have been convicted for the fatal assault inflicted on one Kudrat Nadaf. The convictions imposed upon the appellant Rahim Nadaf are under Sections 302 and 148 of the Indian Penal Code. Under the former he has been sentenced to death but under the latter no separate sentence has been awarded to him. The remaining appellants with the exception of the appellant Sakruddin Nadaf have each been convicted under Section 326 read with Section 149 of the Indian Penal Code as also under Section 147. Under the former section each of them has been sentenced to undergo rigorous imprisonment for a period of two years while under the latter for a period of one year only. The last appellant Sakruddin Nadaf has been convicted under Section 302 read with Section 34 as also under Section 147 of the Indian Penal Code. Under the former section he has been sentenced to transportation for life and under the latter to rigorous imprisonment for a period of one year. The different sentences imposed upon the appellants have been directed to run concurrently.

2. It is not challenged that Kudrat Nadaf met his sudden death on 2-5-1955 at about 10 p.m. as a result of a bhala injury inflicted on his chest while he was in the courtyard of his house in village Bhitti which is within the jurisdiction of police station Mufassil Bhagalpur. Apart from the oral evidence on the record, this fact is fully established by the circumstantial evidence found by the investigating officer Sureshwar Prasad Singh (P. W. 25) on the same night when he arrived there at about 2 a.m. on the receipt of the information about the occurrence as also by the report of Dr. M. Bhagat, Civil Assistant Surgeon, who held post mortem examination on the body of the deceased at about 1 p.m. on 3-5-1955. At the trial the investigating officer (P. W. 25) stated :

> "I reached Sabour Railway Station on a Police Truck and contacted the A.S.M. on duty there. From there, I went to village Bhitti and reached there at 2 a.m. It was a stormy and rainy night while I was going there. On reaching the house of Kudrat Nadaf, I found his dead body lying in his verandah facing north. I recorded the Fard Beyan of Mussamat

Sadika, daughter of Kudrat Nadaf the deceased."

His further statement was : On reaching village Bhitti, I found choukidar Sudin Dusadh (P. W. 18) and Dafadar Lakshaman Ram (P. W. 21) keeping in their custody 8 persons at the house of Wajid Hussain of the same village. I started investigation and further examined Musammat Sadika. Since it was night I inspected the place of occurrence to some extent only. I found the dead body of Kudrat lying in the southern verandah of the north facing room. The dead body was lying on a chatai made of Khajur leaves. I found pool of blood round the dead body on the chatai. This is that chatai marked Ex. II. I found one read gamchha tied round the injury on the chest of deceased.....I reinspected the P.O. in the morning. I had not fully inspected the P. O. in the night since there was no sufficient light and since it was drizzling. I found one cot lying west to east in the courtyard. On inspecting it, I found blood-like marks at several places on it. I took charge of the khatia and the aforesaid chatai. I found brickbats and bamboo splinters (farttis) in the courtyard. I also found brickbats on the roofs of the house of the deceased. I found tiles on the roofs broken at several places, I seized some of the brickbats and bamboo farttis.....I had found blood marks on the pillars of the verandah, in the verandah on and beyond the chatai. I scraped the blood and took charge of it. The P.O. was the house of deceased Kudrat, situated on the western and northern extremity of village Bhitti. The house lies in tola Sultanpore of Bhithi." These statements made by the investigating officer were not challenged at the trial and I see no reason to disbelieve them. The evidence of Dr. M. Bhagat given in the committing court was tendered at the trial. There he stated :

"I found the following injuries :

(i) Penetrating wound ¼" x ¼" x lung deep in front of the chest in the fourth interspace in mid clavicular line. External wound oblique and directed downwards and inward.

On dissection - There were blood clots under the skin, subcutaneous tissue and muscle on the left side of the chest just above cordial region. Compound fracture of the fourth rib near the costal junction. In the upper lobe of the left lung cut round 3/4" x ½" x 1" in front just beneath the wound described above. About 2 pints of liquid blood was present in the left pleural cavity. There was no injury in the heart." According to the opinion of the doctor, the wound was ante mortem in nature and was caused by heavy sharp pointing weapon such as bhala. The age of the injury was within 24 hours. Further, he was of the opinion that death was due to perforation of the lung. The defiance did not cross-examine this witness nor any particular criticism has been pointed out against him or his evidence. Therefore, in my opinion, the report given by the doctor and the circumstances found by the investigating officer at the place of occurrence weighed in the light of the report of the chemical examiner and the serologist to the effect that the articles sent to him by the investigating officer had on them marks of human blood fully corroborate the evidence of the eye-witnesses and prove beyond doubt, as stated above, that Kudrat Nadaf met his death on 2-5-1955, at 10 p.m. as a result of a fatal blow inflicted on his chest by a bhala while he was then in his house. The only question for consideration is as to whether it were the appellants who were responsible for that assault.

3. According to the prosecution one Tabia, the first wife of Alim (P. W. 8), was the source of all the troubles. The evidence on the record shows that the deceased Kudrat Nadaf died leaving five

sons, namely (1) Alim (P. W. 8), (2) Gafoor (P. W. 9), (3) Doman (P. W. 10), (4) Jhanno (P. W. 12) and (5) Podin (P. W. 19) and a daughter Sadika (P. W. 1). Tabia was married with Alim about 11 or 12 years ago. But most likely the relationship between Tabia and Alim was not happy and perhaps for that reason Tabia used to run away off and on from the house of Alim. Alim being fed up with this attitude of Tabia married a second wife Sajida (P. W. 4) about three years back. This, however, did not end the trouble for the people of Tabia were still anxious to see that she should settle down peacefully in the house of Alim and that she should be maintained by Alim, but for Tabia, apart from other reasons which there may be, the new situation arising from the presence of Sajida (P. W. 4) in that house as her husband's second wife proved all the more unbearable. It is said that in the month of Aghan preceding the date of occurrence Sakruddin, who is probably related to her, if not directly at least indirectly, brought Tabia back to the house of Alim and tried that she should live there a normal life. In spite of that, Tabia again fled away. And this perhaps thereafter became the subject of common talk in the family of the deceased Kudrat Nadaf. The sketch map on the record and the evidence given by the witnesses show that the appellant Sakruddin and his four brothers, namely, appellants Rahim, Lalho, Hafiz and Aluddin, as also the appellants Ganno and his wife's brother Mahmood have their houses in the same village close to the house of the family of Kudrat Nadaf. So also is the case with the other two appellants, namely, Warsali and Yasin, who though not connected with the family of Sakruddin yet are residents of the same village and live somewhere in their neighbourhood. It is said that on the day of occurrence at about 4 p.m. Sajida (P. W. 4) and Kari (P. W. 6), wife of Doman (P. W. 10), were talking about Tabia whereupon Sadika (P. W. 1) asked them not to talk about her. This, it is said, was overheard by the appellant Sakruddin from his house, which, as stated above, was at a close distance from there. Sakruddin hearing that rushed to the courtyard of Kudrat Nadaf and started abusing the female inmates of that house, the male members of the family then being out.' The case of the prosecution is that this led to a battle of abuses between them in the course of which Sakruddin suddenly pulled away the sari of Sajida (P. W. 4) and then tried to drag Kari also by catching hold of her hand. The latter resisted and sat down in the courtyard whereupon Sadika picked up one metia (small earthen pot) and hurled the same on Sakruddin. At that he fled away but soon returned with a kutli (small stick) and began abusing Sajida again. That led to another round of abuses from both sides. This time, it is said, Sakruddin gave one lathi blow on the shoulder of Sajida and thereafter ran away from there to his darwaza. In the meantime on the hulla raised by the females, some neighbours including Naim (P. W. 13), Mansoor (P. W. 3) and Alim (P. W. 8) arrived there and saw some parts of that occurrence. For the moment the matter ended there. It is, however, said that in spite of this temporary full in the fight, parties still continued hurling abuses on each other from their respective houses; and in the course of it the members of Sakruddin's party went further and not only gave threats to the other side but also threw brickbats in the courtyard and on the roof of Kudrat Nadaf. Podin (P. W. 19) in the meantime was the first in the family among male members to arrive back and to witness all that at about 5 p.m. He, however, being a lad of nineteen only got terrified at what he heard and saw and kept complete silence over the matter. Thereafter at about 7 p.m. Jhanno (P. W. 12) returned from Fatehpur. He on receipt of the report as to what had happened advised the females not to be much perturbed over the matter and to keep patience. He himself in the meantime went to the mosque in the village which is at a short distance from his house for getting a panchaiti over the matter. During those days, it being the month of Ramzan, the people of the village, which appears to be populated by the Muslims alone, used to collect in the mosque after dusk for offering Torabi prayer. There Jhanno met, among others, Md. Majid (P. W. 7), Md. Torab (P. W. 11), Ibrahim (P. W. 16) and Md. Samid (P. W. 17). Tarabi prayer takes sometime, say about two

hours, and so he as also the appellant Sakruddin, who too happened to arrive there either on his own initiative or at the instance of the villagers, were asked to wait at the mosque till the prayer was over. Jhanno accordingly remained there sitting while the appellant Sakruddin, it is said, in the very midst of prayer left the mosque and went to his house. At about 10 p.m. Kudrat Nadaf came back from Bhagalpur. The prosecution case is that in the meantime in between 8 to 10 p.m. other appellants also collected at the house of Sakruddin and they kept hurling abuses and throwing brickbats all along till then on the house of Kudrat Nadaf. When Kudrat Nadaf came back, he on seeing what was going on and having heard what had already happened challenged the appellants and abused them too as to why they were thus harassing the female members of the house. Thereupon the party of the appellants shouted "Isi sale ko maro" adding that he was wicked. At that the appellants entered the courtyard of Kudrat Nadaf, some by jumping over the western wall and some through the entrance to the courtyard which lay in the south-western side. Of them, the appellant Rahim was then armed with a bhala and the rest with lathis and brickbats. In the courtyard the appellant Sakruddin, it is said, caught hold of the chabathi (jaw) of Kudrat and threw him down on the floor and while he was in that position the appellant Rahim struck him with a bhala blow on the chest and others smashed the tiles of the chapper with lathis and brickbats and thereafter all of them fled back. In the meanwhile Kudrat Nadaf having received the blow got up in a fit and tried to rush out when he fell down on a chatai spread on verandah and there he began tossing in pain crying that he would not survive. Just then his three other sons Doman (P. W. 10), Alim (P. W. 8) and Gafoor (P. W. 9) returned from outside. They on their arrival saw their father lying unconscious with bleeding injuries on his chest. Alim then and there tied his gamcha round the injury while Sadika rushed to the mosque and raised hulla about the murder of her father and there informed Jhanno and others about the occurrence. Hearing that, Jhanno along with P. Ws. 7, 11 and 17 ran to the house. By then Kudrat Nadaf had succumbed to the injury. So they on arrival there saw him lying dead with bleeding injuries and heard the names of the culprits from the inmates of the family. Those people on receipt of the report decided to get hold of the culprits and accordingly they with the help of the chaukidar Sudin (P. W. 18), who also in the meantime had arrived there, captured all the appellants excepting Mahmood and subsequently those arrested were handed over by the chaukidar to the investigating officer Sureshwar Prasad Singh (P. W. 25) on his arrival there the same night at about 2 a.m.

4. At the trial the prosecution rested its case mainly on the oral evidence of four eye-witnesses, namely P. Ws. 1, 4, 6 and 19 as also on the evidence of P. Ws. 7, 8, 9, 10, 11, 12, 13 and 16, who, it was alleged, arrived at the house of the deceased soon after the occurrence and heard the names of the appellants as the assailants from the inmates of the family. Of these, P. Ws. 9 and 10 were tendered at the trial. Besides them, there was one more person as a prosecution witness from the village, namely, Mansoor (P. W. 3). The claim about him was that he was also one of those who had seen the afternoon occurrence at 4 p.m. along with P. W. 13.

5. The trial Court on a consideration of the entire evidence on the record accepted the evidence of eye-witnesses and that of others and convicted the appellants as stated above.

6. The appellants did not enter into any specific defence. They simply challenged the veracity of the prosecution witnesses and relied on some contradictions here and there made by them in the course of their evidence. According to the defense, the entire case was false and the appellants had been falsely implicated in the case.

7. Mr. Prem Shankar Sahay appearing for the appellants has taken us through the entire evidence of the eye-witnesses as also the other evidence on the record. (His Lordship then examined the grounds of attack arising out of the facts alleged and proved by the prosecution and held them as not substantial.)

8. Next some points of law have also been raised in support of the appeals.

9. The first point raised is that the examination of the appellants under Section 342 of the Code of Criminal Procedure was not done in accordance with law and as such the trial has been vitiated. In support of this contention reliance has been placed on the cases of *Tara Singh v. The State*[1]*, Hate Singh v. State of M. B*[2]*.,* and *Machander v. State of Hyderabad*[3]*,* In my opinion, in this case the examination of the appellants under S 342 of the Code of Criminal Procedure at the trial cannot be said to be one not substantially conducted in accordance with law. The attention of appellant Sakruddin was drawn to the fact that he overthrew Kudrat Nadaf. Similarly, specific question was put to Rahim that it was he who struck Kudrat Nadaf with a bhala and committed his murder. Further each of the appellants was asked as to whether, he formed the unlawful assembly with the object mentioned in the charge. Therefore, it is clear that the attention of the appellants was drawn to all the important overt acts said to have been committed by them. The grievance made, however, is that no question was put to the two injured appellants as to how they received Injuries on their persons. In my opinion, this was on the facts of this case not very important. The injuries on the persons of Sakruddin and Yasin, as already stated, were very minor and further that fact has not been used against the appellants in assessing their guilt. Therefore there is no justification to hold that on the facts of this case the appellants were not examined in accordance with law or that they have been in any manner prejudiced by the non-examination of two injured accused on the question of injury.

10. The other point of law raised relates to the conviction of the appellant Sakruddin under Section 302/34 of the I. P. C. The charge framed against Sakruddin was under two heads - one under Section 147 and the other under Section 302/149, I. P. C. There was no charge against him or any of the other appellants under Section 302/34, I. P. C. On that ground, therefore, it has been argued that the trial Court was wrong to convict appellant Sakruddin under Section 302/34 of the I. P. C., in the absence of any charge under that section. In support of this contention reliance has been placed on the cases of *Nanak Chand v. State of Punjab*[4]*, Suraj Pal v. State of Uttar Pradesh*[5]*,* and *W. Slaney v. State of M. P*[6]*.,*

11. In the case of AIR 1955 SC 274 the appellant was charged under section 148 and under Section 302/149 of the I. P. C. The trial Court on assessing the evidence, however, convicted the appellant along with three others under Section 302/34 of the I. P. C. In appeal the High Court held that the appellant was proved to be guilty for the substantive liability under Section 302, I. P. C., and, therefore, convicted him under that section and further altered the conviction of the other three accused to one under Section 323. In doing that the High Court came to the opinion that on the facts of the case found by them Section 34 was not applicable. In those circumstances the argument advanced in the Supreme Court was that as the appellant had been acquitted of the charge of rioting and of the offence under Section 302/149, I. P. C., he could not be convicted for the substantive offence of murder under Section 302 of the I. P. C. without a charge having been framed against him under that section. The principle relied upon in support of this contention was

that Section 149 read with Section 302 of the I. P. C., creates a specific offence and is separate from that of murder punishable under Section 302 of the I. P. C. Therefore, a separate charge under Section 302, I. P. C., was obligatory for his conviction under that section as contemplated by the basic principle on the matter of charge laid down in Section 233 of the Code of Criminal Procedure and that in no case the provisions of Sections 236, 237 or 238 of the Code of Criminal Procedure could apply to a case of that type.
In answer to that the learned Judges of the Supreme Court held that a person charged with an offence read with Section 149 cannot be convicted of the substantive offence itself in the absence of a charge under that section as required by Section 233 of the Code of Criminal Procedure. This case, therefore, does not directly deal with the question as to whether a person charged of an offence under Section 302/149 cannot be convicted under Section 302/34 without a specific charge thereunder.

12. In AIR 1955 SC 419, the accused persons had been charged under Section 302/149 as also under Section 307/149 of the I. P. C., and other sections read with Section 149 and for rioting. The trial Court on hearing the evidence found that the charges framed against them were proved and accordingly convicted them under those sections. On appeal the High Court came to the conclusion, as stated In the Supreme Court decision, that –

> "....neither the attempt on the life of Bisheshwar by pistol fire nor the actual death of Surajdin by pistol fire can be said to have been in prosecution of the common object of the unlawful assembly nor to have been within the
> knowledge of the accused as being so likely. It was, therefore, held that none of the accused could be found guilty under Section 149, with reference to, the attempt on the life of Bisheshwar, or the death of Surajdin.

All the same, in view of the fact that the evidence showed that the person who inflicted the pistol fire as against both was the appellant Suraj Pal, it was held that he was guilty of the offence under Sections 307 and 302, I. P. C.". The High Court, therefore, set aside the conviction and sentences of all other accused under Section 307/149 and 302/149, I. P. C., but convicted Suraj Pal for the substantive liability under Sections 307 and 302 of the I. P. C. On those facts it was argued on behalf of Suraj Pal in the Supreme Court that no specific charge having been framed against him at the trial either under Section 307 or under Section 302 of the I. P. C., he should not have been convicted for the substantive liability under those sections. In answer to that the Supreme Court held :

> "Whether or not S. 149, I. P. C., creates a distinct offence (as regards which there has been, conflict of views in the High Courts) there can be no doubt that it creates a distinct head of criminal liability which has come to be known as 'constructive liability' - a convenient phrase not used in the I. P. C. There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence.

Such a case is not covered by Sections 236 and 237, Criminal Procedure Code. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constitution an

offence, is the foundation for a conviction and sentence therefor. The absence, therefore, of specific charges against the appellant under Sections 307 and 302, I. P. C. in respect of which, he has been sentenced to transportation for life and to death respectively is a very serious lacuna in the proceedings in so far as it concerns him. The question then which arises for consideration is whether or not this lacuna has prejudiced him in his trial."

13. Finally on a consideration of the question of prejudice it was held therein :

> "In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellant under Sections 307 and 302, I. P. C., has materially prejudiced him. We must accordingly set aside the convictions and sentences of the appellant under Sections 307 and 302, Penal Code."

14. This case, therefore, also does not deal with the question raised here, namely, as to whether a person charged under Section 302/149 can or cannot be convicted under Section 302/34 of the I. P. C., in the absence of any charge therefor. The last case, namely, that of AIR 1956 SC 116 also deals with the same question as is covered by the two cases already discussed above. In that case two persons were charged under Section 302/34 of the I. P. C. The trial Court on a consideration of the entire evidence acquitted one of them and convicted the other under Section 302 on the ground that that person had inflicted a fatal blow and therefore made him directly liable for the murder. On those facts the question which arose for consideration in the Supreme Court was as to whether the conviction of that person who was the appellant there for the liability under Section 302 could be maintained in the absence of any charge for that section. In that view of the matter, that case also is of no assistance to the defence on the facts of this case. As a matter of fact, the question as to whether an accused charged under Section 302/149 or under Section 302/34 can be convicted for the substantive offence under Section 302 without any charge for that section does not arise for consideration in this case at all. Therefore, that question need no discussion here.

15. There are, however, other decisions of the Supreme Court which bear directly on the point under discussion. They are *Lachhman Singh v. The State*[7], and *Karnail Singh v. State of Punjab*[8],

16. In AIR 1952 SC 167 there were seven accused at the trial. Five of them were charged for the offence under Section 302/149 and under Section 201/149 and the remaining two only under Section 201/149, Indian Penal Code. The trial Court convicted the first five under section 302/149 and one of the remaining two under Section 201/149, the last one having been acquitted by it. On appeal in the High Court the conviction of three of the first five was altered from one under Section 302/149 to that under Section 302/34 and the other three were acquitted by it. On those facts the point raised in the Supreme Court was that there being no charge under Section 302/ 34 the conviction of the appellants under Section 302/149 could not have been altered by the High Court to one under Section 302/34. In answer to that their Lordships of the Supreme Court observed that the facts of the case were, such that the accused could have been charged either under Section 302/149 or under Section 302/34 of the I. P. C., and there was nothing wrong in the alteration made by the High Court.

17. In the case of AIR 1954 SC 204 there were eight accused. They were charged under Section 148 and under Section 302/149, I. P. C. The trial Court on assessing the evidence acquitted two

of them and convicted the remaining six under Section 148 and under Section 302/149 of the I. P. C. On appeal in the High Court four of those six were acquitted but the conviction of the other two was confirmed subject to this that their convictions under Section 302/149 were altered to those under Section 302/34. On those facts one of the points raised in the Supreme Court was that their conviction under Section 302/34 was bad as no charge had been framed against them under that section. In answer to that their Lordships observed :

> "It is true that there is substantial difference between the two sections but as observed by Lord Sumner in *Barendra Kumar Ghosh v. Emperor*[8], they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by S. 34.

If the common object which is the subject-matter of the charge under Section 149 does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not therefore to be
permitted. But if the facts to be proved and the evidence to be adduced with reference
to the charge under Section 149 would be the same if the charge were under Section 34 then the failure to charge the accused under Section 34 could not result in any prejudice and in such cases the substitution of Section 34 for Section 149 must be held to be a formal matter."

18. These decisions, therefore, make it clear that though Section 149 read with Section 302 constitutes a separate offence and is different to the substantive offence under Section 302 yet the constructive liability under Section 149/302 may not in all circumstances be different to that which comes under Section 34/302. In other words, the constructive liability under Section 149/302 and that under Section 302/34 are to a certain extent overlapping. We know that under Section 34 the two elements that constitute the crime are the common intention and the participation in the crime while those in the case under Section 149 are the common object and the participation in the unlawful assembly. Therefore, in cases where the common object becomes equivalent to the common intention and where participation in the assembly is coupled with the participation in the crime then the two elements of both the constructive liabilities become the same. In such cases therefore, no separate charge need be framed for each of them as laid down under Section 233 of the Code of Criminal Procedure and the conviction of the accused may be altered from one under Section 302/149 to that under Section 302/34 without there being a charge for the latter as provided under Sections 236 and 237 of the Code of Criminal Procedure. That being so, the proposition advanced by Mr. Prem Shanker Sahay to the effect that an accused charged under Section 302/149 can in no case in law be convicted under Section 302/34 in the absence of any charge under that section is too wide and cannot be accepted as such. The true rule of law is that such an alteration can be made but only in cases where the common object mentioned in the charge becomes the same as the common intention necessary for the conviction under Section 34 and where participation in the assembly is proved by the participation in the crime. In this case, however, on a analysis of the evidence on the record it is difficult to hold that the common object mentioned in the charge is the same as the common intention necessary for the conviction under Section 302/34 though no doubt the participation in the unlawful assembly in this case was in the form of the participation in the crime. The object mentioned in the charge was to commit, mischief at the house of Kudrat Nadaf and to assault him and not to murder him. Further there is no evidence on the record to establish

conclusively the element of common intention in appellant Sakruddin which is necessary to establish a charge under Section 302/34 as contemplated by the rule of law laid down in *Mahbub Shah v. Emperor*[9], *Mamand v. Emperor*[10], *Fazoo Khan v. Jatoo Khan*[11], and *Kripal v. State of U.P*[12]., If, therefore, there is no evidence that the intention of appellant Sakruddin in common with the appellant Rahim was necessarily to murder Kudrat Nadaf. he cannot be convicted under Section 302/34, I. P. C. Moreover, it does not look very consistent that though other members of the assembly had from the beginning only the common object to commit mischief and assault Kudrat Nadaf yet the appellant Sakruddin having lost sight of his common object suddenly developed a common intention along with appellant Rahim to kill Kudrat Nadaf. The act of catching hold of the chabathi (jaw) of Kudrat Nadaf and of throwing him down in the courtyard on the part of appellant Sakruddin is in no way Inconsistent with the common object he had in mind from the very beginning when he joined the unlawful assembly though it is true that in doing those acts in the heat of the moment he not only participated in the unlawful assembly but went further and participated to a certain extent in the crime of the fatal assault committed by Rahim. Therefore, on the facts of this case, the learned Additional Sessions Judge was wrong to convict the appellant Sakruddin under Section 302/34, I. P. C. In my opinion, the only charge proved against him is also the same, namely, he like others was a member of the unlawful assembly and as other members of the unlawful assembly have been convicted under Section 326/149 so his conviction should also be altered from one under Section 302/34 to that under Section 326/149, I. P. C. I, however, think that as he identified himself very much in his overt act as compared with others in the execution of the common object, the sentence imposed upon him should be one of seven years' rigorous imprisonment.

19. Then remains the question of sentence on other appellants. In my opinion, the learned Additional Sessions Judge is wrong to say that "There is hardly any extenuating or mitigating circumstance in favour of the accused Rahim". The facts on the record clearly show that exchange of abuses had been hurled from the side of the prosecution party also; so much so that even Kudrat Nadaf had just before the occurrence used abusive language against the appellants. Then there is no evidence that the murder was planned one. It was after all a sudden family dispute over a small matter and that at the spur of the moment. Therefore, it cannot be ruled out that what Rahim did was in a fit of anger. In those circumstances, I think the proper sentence which should be imposed upon him under Section 302, I. P. C., is the lesser sentence, namely, transportation for life. The sentence, therefore, of Rahim Nadaf imposed under Section 302 of the I. P. C., is altered from one of hanging to that of transportation for life.

20. The sentences imposed on other appellants, in view of what they committed, cannot on merit be said to be excessive. Law cannot allow the negation of the sacred sanctity which every citizen under law is permitted to have in his own house. It is extremely savagery and a lack of the proper sense of a responsible citizen on the part of any person or any collection of person to enter the house of others armed with weapons and to assault them there. This, in my opinion, is not only a denial of the rule of law but also an abuse of the protection that law gives to every citizen. However, because of their tender and young age, I would like to take a little charitable view so far as the appellants Hafiz Nadaf and Yasin Nadaf are concerned. Hafiz and Yasin are each only nineteen years while Lalho is only twenty. It may be that they in the heat of the moment were carried away to support their elders. I hope that they would be careful not to do the same in future. With this hope I reduce their sentence under Section 326/149 from one of two years' rigorous imprisonment to that of one year's rigorous imprisonment only. So far as the remaining

appellants are concerned, namely, Alauddin, Ganno, Md. Nadaf and Warsali, I see no ground to interfere with the sentences imposed upon them.

21. In the result, therefore, the reference is discharged and the appeal of Alauddin, Ganno, Md. Nadaf and Warsali is dismissed as one without merit while the appeal of Sakruddin, Rahim, Hafiz, Lalho and Yasin is dismissed subject to the modifications that the conviction of Sakruddin is altered from one under Section 302/34 to that under Section 326/149 of the I. P. C., and he is sentenced thereunder to undergo rigorous imprisonment for a period of seven years, the sentence imposed upon Rahim under Section 302 is altered to one of transportation for life, while the sentence of each of the remaining three appellants Hafiz, Lalho and Yasin imposed upon them under Section 326/149 of the I. P. C., is reduced from two years' rigorous imprisonment to one year's rigorous imprisonment. The appellants on bail should accordingly now surrender to complete the unexpired portion of their sentences.

Sinha, J.

13. I agree.

Order accordingly.

Cases Referred.

[1] AIR 1951 SC 441
[2] AIR 1953 SC 468
[3] AIR 1955 SC 792
[4] AIR 1955 SC 274
[5] AIR 1955 SC 419
[6] AIR 1956 SC 116
[6] AIR 1952 SC 167
[7] AIR 1954 SC 204
[8] AIR 1925 PC 1
[9] AIR 1945 PC 118
[10] AIR 1946 PC 45
[11] AIR 1931 Cal 643
[12] AIR 1954 SC 706