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Das J.

Achhar Singh(1), The first three cases are of no assistance to him although the second and third relate to Brahmins of Gurdaspur, for the properties in dispute in those cases were ancestral and the respondent does not now dispute the appellant's right to succeed to her father's ancestral properties. These cases, therefore, do not throw any light on the present case which is concerned with the question of succession to self-acquired property. Further, in the last case, the collaterals were beyond the fourth degree and it was enough for the Court to say that irrespective of whether the properties in dispute were ancestral or self-acquired the collaterals in that case could not succeed. It is also to be noted that the earlier decisions were not cited or considered in that case.

In our opinion the appellant has failed to discharge the onus that was initially on him and that being the position no burden was cast on the respondent which she need have discharged by adducing evidence of particular instances. In these circumstances, the general custom recorded in Rattigan's book must prevail and the decision of the High Court must be upheld. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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NANAK CHAND
v.
THE STATE OF PUNJAB.

[S. R. DAS, BHAGWATI and SYED JAFER IMAM JJ.]

Indian Penal Code (Act XLV of 1860), s. 34—Merely explanatory—No offence created thereby—Ss. 34 and 149 of the Indian Penal Code—Distinction between the two—Code of Criminal Procedure (Act V of 1898), s. 233—Charge under s. 302 read with s. 149, Indian Penal Code—No specific charge under s. 302, Indian Penal Code as required by s. 233 of the Code of Criminal Procedure—Conviction under s. 302—Legality thereof.

Section 34 of the Indian Penal Code is merely explanatory. It does not create any specific offence. Under this section several persons must be actuated by a common intention and when in further-

(1) A.I.R. 1936 Lah. 68.

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ance of that common intention a criminal act is done by them, each of them is liable for that act as if the act had been done by him alone.

There is a clear distinction between the provisions of s. 34 and s. 149 of the Indian Penal Code and the two sections are not to be confused. The principal element in s. 34 of the Indian Penal Code is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation s. 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in s. 149 of the Indian Penal Code. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and the other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no comman intention and no participation by the other members in the actual commission of that offence.

There is a difference between object and intention, for although the object may be common, the intentions of the several members of the unlawful assembly may differ and indeed may be similar only in one respect namely that they are all unlawful, while the element of participation in action, which is the leading feature of s. 34, is replaced in s. 149 by membership of the assembly at the time of the committing of the offence.

A charge for a substantive offence under section 302, or section 325 of the Indian Penal Code, etc. is for a distinct and separate offence from that under section 302, read with section 149 or section 325, read with section 149, etc.

A person charged with an offence read with s. 149 cannot be convicted of the substantive offence without a specific charge being framed as required by s. 233 of the Code of Criminal Procedure.

There was no room for the application of s. 236 of the Code of Criminal Procedure to the facts of the present case.

The provisions of s. 236 of the Code of Criminal Procedure can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative charges can be framed. In the present case there was no doubt about the facts and if the allegation against the appellant that he had caused the injuries to the deceased with *takwa* was established by evidence, then there could be no doubt that the offence of murder had been committed.

In the present case there was no question of any error, omission or irregularity, in the charge within the meaning of s. 537 of the Code of Criminal Procedure because no charge under s. 302 of the Indian Penal Code was in fact framed.

There was an illegality in the present case and not an irregularity which was curable by the provisions of ss. 535 and 537 of the Code of Criminal Procedure. Assuming however that there was merely an irregularity which was curable, the irregularity in the circumstances of the case was not curable because the appellant was misled in his defence by the absence of a charge under s. 302 of the Indian Penal Code.

By framing a charge under s. 302, read with s. 149, Indian Penal Code against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under s. 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may be well have considered it unnecessary to concentrate on that part of the prosecution case.

Barendra Kumar Ghosh v. *Emperor* ([1925] I.L.R. 52 Cal. 197), *Queen* v. *Sabid Ali and others* ([1873] 20 W.R. (Cr.) 5) *Panchu Das.* v. *Emperor* ([1907] I.L.R. 34 Cal. 698), *Reazuaddi and Others* v. *King-Emperor* ([1901] 6 C.W.N. 98), *Emperor* v. *Madan Mandal and Others* ([1914] I.L.R. 41 Cal. 662), *Theethumalai Gounder and Others* v. *King-Emperor* ([1924] I.L.R. 47 Mad. 746), *Queen-Empress* v. *Bisheshar and Others* ([1887] I.L.R. 9 All. 645), *Taikkottathil Kunheen* ([1923] 18 L.W. 946), *Ramasray Ahir* v. *King-Emperor* ([1926] I.L.R. 7 Patna 484), *Sheo Ram and Others* v. *Emperor* (A.I.R. 1948 All. 162), and *Karnail Singh and another* v. *State of Punjab* ([1954] S.C.R. 904), referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 132 of 1954.

Appeal by Special Leave granted by the Supreme Court by its Order dated the 3rd September, 1954 from the Judgment and Order dated the 15th June 1954 of the High Court of Judicature for the State of Punjab at Simla in Criminal in Appeal No. 287 of 1954 arising out of the Judgment and Order dated the 14th April 1954 of the Court of Additional Sessions Judge in Session Case No. 4 of 1954.

J. G. Sethi, (*Naunit Lal,* with him), for the appellant.

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Gopal Singh and *P. G. Gokhale,* for the respondent.

1955. January 25. The Judgment of the Court was delivered by

IMAM J.—This appeal by Nanak Chand comes by special leave against the judgment of the Punjab (I) High Court. The appellant was convicted by the High Court under section 302 of the Indian Penal Code and the sentence of death passed on him by the Additional Sessions Judge of Jullundur was confirmed.

On the facts alleged by the prosecution there can be no doubt that Sadhu Ram was killed on the 5th of November, 1953, at about 6-45 P.M. at the shop of Vas Dev P. W. 2. It is alleged that the appellant along with others assaulted Sadhu Ram. The appellant was armed with a takwa. Numerous injuries were found on the person of Sadhu Ram. According to the doctor, who held the post-mortem examination, injuries 1, 3 and 4 were due to a heavy sharp edged weapon and could be caused by a takwa. It was denied by the prosecution that the deceased was assaulted by any other person with a takwa. According to the Medical evidence, injuries 1, 3 and 4 individually, as well as collectively, were enough to cause death in the ordinary course of nature.

In the Court of Sessions the appellant along with others was charged under section 148 and section 302, read with section 149 of the Indian Penal Code. The Additional Sessions Judge, however, held that the charge of rioting was not proved. He accordingly found the appellant and three others guilty under section 302, read with section 34 of the Indian Penal Code. He acquitted the other three accused. There was an appeal by three convicted persons to the High Court and the High Court convicted the appellant alone under section 302 of the Indian Penal Code, confirming the sentence of death but altered the conviction of the other accused from section 302/34 to section 323, Indian Penal Code. It held that the provisions of section 34 of the Indian Penal Code did not apply.

On behalf of the appellant questions of law and questions of fact were urged. It will be unnecessary to deal with the questions of fact if the argument on points of law is accepted.

The principal question of law to be considered is as to whether the appellant could legally be convicted for merder and sentenced under section 302, Indian Penal Code when he was not charged with that offence. It was urged that as the appellant had been acquitted of the charge of rioting and the offence under section 302/149 of the Indian Penal Code, he could not be convicted for the substantive offence of murder under section 302, Indian Penal Code, without a charge having been framed against him under that section. Reliance has been placed on the provisions of the Code of Criminal Procedure relating to the framing of charges, the observations of the Privy Council in *Barendra Kumar Ghosh* v. *Emperor*(1) and certain decisions of the Calcutta High Court to which reference will be made later on. It was urged that for every distinct offence of which a person is accused, there shall be a separate charge and every such charge shall be tried separately except in cases mentioned under sections 234, 235, 236, 237 and 239 of the Code of Criminal Procedure. Section 149 of the Indian Penal Code creates a specific offence and it is a separate offence from the offence of murder punishable under section 302 of the Indian Penal Code. The provisions of sections 236, 237 and 238 of the Code of Criminal Procedure did not apply to the facts and circumstances of the present case. On behalf of the Prosecution, however, it was urged that section 149 did not create any offence at all and therefore no separate charge was obligatory under section 233 of the Code of Criminal Procedure and that in any event the provisions of sections 236 and 237 of the Code of Criminal Procedure did apply and the appellant could have been convicted and sentenced under section 302 of the Indian Penal Code, although no charge for the substantive offence of murder had been framed against him.

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

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It is necessary, therefore, to examine the provisions of section 149 of the Indian Penal Code and consider as to whether this section creates a specific offence. Section 149 of the Indian Penal Code is to be found in Chapter VIII of that Code which deals with offences against the public tranquillity. Section 149 of the Indian Penal Code reads :—

"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

This section postulates that an offence is committed by a member of an unlawful assembly in prosecution of the common object of that assembly or such as a member of the assembly knew to be likely to be committed in prosecution of that object and declares that in such circumstances every person, who was a member of the same assembly at the time of the commission of the offence, was guilty of that offence. Under this section a person, who is a member of an unlawful assembly is made guilty of the offence committed by another member of the same assembly, in the circumstances mentioned in the section, although he had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. Without the provisions of this section a member of an unlawful assembly could not have been made liable for the offence committed not by him but by another member of that assembly. Therefore when the accused are acquitted of riot and the charge for being members of an unlawful assembly fails, there can be no conviction of any one of them for an offence which he had not himself committed. Similarly under section 150 of the Indian Penal Code, a specific offence is created. Under this section a person need not be a member of an unlawful assembly and yet he would be guilty of being a member of an unlawful assembly and guilty of an offence which may be committed by

a member of the unlawful assembly in the circumstances mentioned in the section. Sections 149 and 150 of the Indian Penal Code are not the only sections in that Code which create a specific offence. Section 471 of the Indian Penal Code makes it an offence to fraudulently or dishonestly use as genuine any document which a person knows or has reason to believe to be a forged document and it provides that such a person shall be punished in the same manner as if he had forged such document. Abetment is an offence under the Indian Penal Code and is a separate crime to the principal offence. The sentence to be inflicted may be the same as for the principal offence. In Chapter XI of the Indian Penal Code offences of false evidence and against public justice are mentioned. Section 193 prescribes the punishment for giving false evidence in any stage of a judicial proceeding or fabricating false evidence for the purpose of being used in any stage of a judicial proceeding. Section 195 creates an offence and the person convicted of this offence is liable in certain circumstances to be punished in the same manner as a person convicted of the principal offence. Sections 196 and 197 to 200 of the Indian Penal Code also create offences and a person convicted under any one of them would be liable to be punished in the same manner as if he had given false evidence.

It was, however, urged on behalf of the Prosecution that section 149 merely provides for constructive guilt similar to section 34 of the Indian Penal Code. Section 34 reads:

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".

This section is merely explanatory. Several persons must be actuated by a common intention and when in furtherance of that common intention a criminal act is done by them, each of them is liable for that act as if the act had been done by him alone. This section does not create any specific offence. As was pointed out by Lord Sumner in *Barendra Kumar Ghosh* v. *Emperor*(1) "'a criminal act' means that

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

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unity of criminal behaviour which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence". There is a clear distinction between the provisions of sections 34 and 149 of the Indian Penal Code and the two sections are not to be confused. The principal element in section 34 of the Indian Penal Code is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in section 149 of the Indian Penal Code. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence. In *Barendra Kumar Ghosh* v. *Emperor*(1) Lord Sumner dealt with the argument that if section 34 of the Indian Penal Code bore the meaning adopted by the Calcutta High Court, then sections 114 and 149 of that Code would be otiose. In the opinion of Lord Sumner, however, section 149 is certainly not otiose, for in any case it created a specific offence. It postulated an assembly of five or more persons having a common object, as named in section 141 of the Indian Penal Code and then the commission of an offence by one member of it in prosecution of that object and he referred to *Queen* v. *Sabid Ali and*

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

Others(1). He pointed out that there was a difference between object and intention, for although the object may be common, the intentions of the several members of the unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, was replaced in section 149 by membership of the assembly at the time of the committing of the offence. It was argued, however, that these observations of Lord Sumner were *obiter dicta*. Assuming though not conceding that that may be so, the observations of a Judge of such eminence must carry weight particularly if the observations are in keeping with the provisions of the Indian Penal Code. It is, however, to be remembered that the observations of Lord Sumner did directly arise on the argument made before the Privy Council, the Privy Council reviewing as a whole the provisions of sections 34, 114 and 149 of the Indian Penal Code.

On behalf of the appellant certain decisions of the Calcutta High Court were relied upon in support of the submission made, viz. *Panchu Das* v. *Emperor*(2), *Reazuddi and Others* v. *King-Emperor*(3) and *Emperor* v. *Madan Mandal and Others*(4). These decisions support the contention that it will be illegal to convict an accused of the substantive offence under a section without a charge being framed if he was acquitted of the offence under that section read with section 149 of the Indian Penal Code. On the other hand, the prosecution relied upon a decision of the Full Bench of the Madras High Court in *Theethumalai Gounder and Others* v. *King-Emperor*(5) and the case *Queen-Empress* v. *Bisheshar and Others*(6). The decision of the Madras High Court was given in April, 1924, and reliance was placed upon the decision of the Allahabad High Court. The decision of the Privy Council in *Barendra Kumar Ghosh's case* was in October, 1924. The Madras High Court, therefore, did not have before it the decision of the Privy Council. It is impossible to say what view might have been expressed

(1) [1873] 20 W. R. (Cr.) 5.
(2) [1907] I.L.R. 34 Cal. 698.
(3) [1901] 6 C.W.N. 98.
(4) [1914] I.L.R. 41 Cal. 662.
(5) [1924] I.L.R. 47 Mad. 746.
(6) [1887] I.L.R. 9 All. 645.

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by that court if the Privy Council's judgment in the aforesaid case had been available to the court. The view of the Calcutta High Court had been noticed and it appears that a decision of the Madras High Court in *Taikkottathil Kunheen*(1) was to the effect that section 149 of the Indian Penal Code is a distinct offence from section 325 of the Indian Penal Code. Because of this it was thought advisable to refer the matter to a Full Bench. Two questions were referred to the Full Bench: (1) When a charge omits section 149, Indian Penal Code, and the conviction is based on the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission ? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge ? The Full Bench agreed with the view expressed by Sir John Edge in the Allahabad case that section 149 created no offence, but was, like section 34, merely declaratory of a principle of the common law, and its object was to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. It was observed by Spencer, J. that a person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore the omission of section 149 from a charge does not create an illegality by reason of section 233 of the Code of Criminal Procedure which provides that for every distinct offence of which any person is accused there shall be a separate charge. They did not agree with the general statement in *Reazuddi's case*(2) that it is settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence.

A charge for a substantive offence under section 302, or section 325 of the Indian Penal Code, etc. is for a distinct and separate offence from that under section

(1) [1923] 18 L.W. 946. (2) [1901] 6 C.W.N. 98.

302, read with section 149 or section 325, read with section 149, etc. and to that extent the Madras view is incorrect. It was urged by reference to section 40 of the Indian Penal Code that section 149 cannot be regarded as creating an 'offence' because it does not itself provide for a punishment. Section 149 creates an offence but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it. The finding that all the members of an unlawful assembly are guilty of the offence committed by one of them in the prosecution of the common object at once subjects all the members to the punishment prescribed for that offence and the relative sentence. Reliance was also placed upon the decision of the Patna High Court in *Ramasray Ahir* v. *King-Emperor*(1) as well as the decision of the Allahabad High Court in *Sheo Ram and Others* v. *Emperor*(2). In the former case the decision of the Privy Council in *Barendra Kumar Ghosh's case* was not considered and the decision followed the Full Bench of the Madras High Court and the opinion of Sir John Edge. In the latter case the Allahabad High Court definitely declined to answer the question as to whether the accused charged with an offence read with section 149, Indian Penal Code, or with an offence read with section 34, Indian Penal Code, could be convicted of the substantive offence only.

After an examination of the case referred to on behalf of the appellant and the prosecution we are of the opinion that the view taken by the Calcutta High Court is the correct view namely, that a person charged with an offence read with section 149 cannot be convicted of the substantive offence without a specific charge being framed as required by section 233 of the Code of Criminal Procedure.

It was urged that in view of the decision of this Court in *Karnail Singh and another* v. *State of Punjab*(3) a conviction under section 302, read with sec-

(1) [1928] I.L.R. 7 Patna 484. (2) A.I.R. 1948 All. 162.
(3) 1954 S.C.R. 904.

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tion 149, could be converted into a conviction under section 302/34 which the trial Court did. There could be no valid objection, therefore, to converting a conviction under section 302/34 into one under section 302 which the High Court did. This argument is unacceptable. The High Court clearly found that section 34 was not applicable to the facts of the case and acquitted the other accused under section 302/34, that is to say the other accused were wrongly convicted by the trial court in that way but the appellant should have been convicted under section 302. The High Court could not do what the trial court itself could not do, namely, convict under section 302, as no separate charge had been framed under that section.

It was urged by the Prosecution that under the provisions of section 236 and section 237 of the Code of Criminal Procedure a person could be convicted of an offence which he is shown to have committed although he was not charged with it. Section 237 of the Code of Criminal Procedure is entirely dependent on the provisions of section 236 of that Code. The provisions of section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts in which case any number of charges can be framed and tried or alternative charges can be framed. In these circumstances if there had been an omission to frame a charge, then under section 237, a conviction could be arrived at on the evidence although no charge had been framed. In the present case there is no doubt about the facts and if the allegations against the appellant that he had caused the injuries to the deceased with takwa was established by evidence, then there could be no doubt that the offence of murder had been committed. There was no room for the application of section 236 of the Code of Criminal Procedure.

It had been argued on behalf of the prosecution that no finding or sentence pronounced shall be deemed invalid merely on the ground that no charge was framed. Reliance was placed on the provisions of section 535 of the Code of Criminal Procedure.

Reference was also made to the provisions of section 537 of that Code. Section 535 does permit a court of appeal or revision to set aside the finding or sentence if in its opinion the non-framing of a charge has resulted in a failure of justice. Section 537 also permits a court of appeal or revision to set aside a finding or sentence if any error, omission or irregularity in the charge has, in fact, occasioned a failure of justice. The explanation to the section no doubt directs that the court shall have regard to the fact that the objection could and should have been raised at an earlier stage in the proceedings. In the present case, however, there is no question of any error, omission or irregularity in the charge because no charge under section 302 of the Indian Penal Code was in fact framed. Section 232 of the Code of Criminal Procedure permits an appellate court or a court of revision, if satisfied that any person convicted of an offence was misled in his defence in the absence of a charge or by an error in the charge, to direct a new trial to be had upon a charge framed in whatever manner it thinks fit. In the present case we are of the opinion that there was an illegality and not an irregularity curable by the provisions of sections 535 and 537 of the Code of Criminal Procedure. Assuming, however, for a moment that there was merely an irregularity which was curable, we are satisfied that, in the circumstances of the present case, the irregularity is not curable because the appellant was misled in his defence by the absence of a charge under section 302 of the Indian Penal Code.

By framing a charge under section 302, read with section 149 of the Indian Penal Code against the appellant, the Court indicated that it was not charging the appellant with the offence of murder and to convict him for murder and sentence him under section 302 of the Indian Penal Code was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case. Attention has been

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drawn to the Medical evidence. With reference to injury No. 1 the doctor stated that the wounds were not very clean-cut. It is further pointed out that the other incised injuries on the head were bone deep. The bone, however, had not been cut. Injuries on the head although inflicted by a blunt weapon may sometimes assume the characteristics of an incised wound. Reference was made to Glaister on Medical Jurisprudence, 9th Ed., at page 241, where it is stated that under certain circumstances, and in certain situations on the body, wounds produced by a blunt instrument may stimulate the appearance of an incised wound. These wounds are usually found over the bone which is thinly covered with tissue, in the regions of the head, forehead, eyebrow, cheek, and lower jaw, among others. It is also pointed that Vas Dev P.W. 2 had admitted that Mitu took away the takwa from the appellant after Sadhu Ram had been dragged out of the shop but no takwa blow was given outside the shop. Prakash Chand P.W. 4, another eye-witness, also admitted that Mitu had taken the takwa from the appellant when they had come out of the shop. It was urged that if a specific charge for murder had been framed against the appellant, he would have questioned the doctor more closely about the incised injuries on the head of the deceased, as well as the prosecution witnesses. It is difficult to hold in the circumstances of the present case that the appellant was not prejudiced by the non-framing of a charge under section 302, Indian Penal Code.

Having regard to the view expressed on the question of law, it is unnecessary to refer to the arguments on the facts.

The appeal is accordingly allowed and the conviction and the sentence of the appellant is set aside and the case of the appellant is remanded to the court of Sessions at Jullundur for retrial after framing a charge under section 302 of the Indian Penal Code and in accordance with law.

Appeal allowed.

GIPN.—SV—89 S. C. India/59—22-3-63—1,000.