

**BAUL & ANOTHER**

v.

**STATE OF U.P.**

November 24, 1967

[M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.]

*Indian Penal Code (45 of 1860), ss. 302 and 34—Acquittal of one of two accused—No evidence regarding injuries caused by the other to deceased—Nature of offence committed by him.*

Two accused were charged with an offence under s. 302 read with s. 34 I.P.C. The victim had four *lathi* injuries on his head—two fatal and two simple. One of the accused was acquitted. On the question whether the other could be convicted for an offence under s. 302 *simpliciter* without establishing that he had caused at least one of the major injuries,

**HELD :** As a result of the acquittal of one of the two accused, the common intention was not proved. In such a case it could not be postulated that the other accused alone caused all the four injuries and the prosecution must establish the exact nature of the injury caused by him. In the absence of such evidence, he must be given the benefit of doubt with respect to the offence under s. 302, but may be convicted for the offence of causing grievous hurt under s. 325 [453 H; 454 A-B, C]

**CRIMINAL APPELLATE JURISDICTION :** Criminal Appeal No. 47 of 1965.

Appeal by special leave from the judgment and order dated August 31, 1964 of the Allahabad High Court in Criminal Appeal No. 397 of 1963.

*P. K. Chakravarti and C. P. Lal*, for the appellants.

*K. K. Jain and O. P. Rana*, for the respondent.

The Judgment of the Court was delivered by

**Hidayatullah, J.** The appellants are father and son. They were prosecuted with one Ramdeo who has been acquitted by the High Court. The prosecution case against them is that on the evening of June 7, 1962, about sun-set they attacked one Ramdular causing him fatal injuries on his head with a *lathi* resulting in his death. The first appellant Baul is said to have instigated the assault and the original prosecution case was that the other appellant Sadhai and Ramdeo (the acquitted accused) assaulted Ramdular. Medical evidence established that the deceased died as a result of two fatal blows on the head, both of which appeared to have caused extensive fractures of the skull. There were two other injuries on the head which were simple. The deceased never regained consciousness after he received the blows and died in the hospital about 11.30 the same night. The occurrence took

- A place in this way. It appears that Baul, the first appellant, and Lurkhur (P.W. 1) who are brothers-in-law were at loggerheads over a right of way. On the day in question Lurkhur was preparing his food near his house and the deceased was at a well nearby. When Baul passed that way there was an exchange of abuses and Baul raised an alarm. Lurkhur's son, the deceased, came out of his house with his wife. On the other side came the appellant Sadhai and the acquitted accused Ramdeo. Baul instigated these two to beat the deceased who was probably very vociferous in his abuses in support of his old father. When this exhortation was made the deceased took to his heels chased by Sadhai and Ramdeo. According to the prosecution evidence both of them hit the deceased on the head with their *lathies*. The deceased attempted to run back to his house but fell down near the door step. The appellants and Ramdeo thereupon retreated.

- The Police Station House is situated within a distance of a mile from the scene of occurrence. Report of the incident was made between 7 and 8 p.m. but was actually recorded at 8 p.m.
- D Badshahpur Hospital is situated within 2-3 furlongs of the police station house and the deceased was sent in an unconscious condition to the hospital. He never regained consciousness before his death. The Sub-Inspector, after recording the first information report, went to the hospital, found the deceased unconscious and, therefore, went to the spot where he found no witness except the wife of the deceased person. He went back to the hospital and then went in search of the appellant Sadhai and arrested him in the village after 10 p.m. The other two accused surrendered in court later on June 18, and June 20. The deceased was examined while he was still alive by Dr. N. D. Burman (P.W. 3) and his report shows that he had "a mutilated" wound of  $4'' \times 1/10'' \times 1/4''$  on the left side and the head  $2\frac{1}{4}''$  above the left eye-brow with swelling  $4'' \times 4\frac{1}{2}''$  in area. The wound was then bleeding. He also had a bluish swelling  $2\frac{1}{2}'' \times 2''$  on the right side of the scalp 2" above the right eye-brow. Both the injuries were said to have been caused with a blunt weapon such as a *lathi*. After the death of the deceased post-mortem examination was done by Dr. M. L. Gouta (P.W. 7). He had the opportunity to examine the injuries more closely. According to him there were :

1. a contusion  $2\frac{1}{2}'' \times 1''$  on the right side of the forehead  $\frac{1}{2}''$  above the right eye-brow.
2. a contusion  $2\frac{1}{2}'' \times 1''$  on the left side head 2" above left ear with swelling of the entire left side of head and face.
3. contused wound  $\frac{1}{2}'' \times \frac{1}{4}''$  scalp on left side of head 2" above the left eye-brow.

4. swelling 3"×2" on right side of head  $\frac{1}{2}$ " above the right ear.

There was also an abrasion on the back of right elbow joint. Internal examination disclosed left and right parietal bones fractured at many places. Front parietal bone of the head was fractured at its joint. Congested clotted blood was present all over the bones of the head. The membranes were besmeared with blood. The right and left hemisphere was entirely covered with clotted blood. The bone on the left side of the base of the skull was also fractured.

There are five eye-witnesses of the actual occurrence of whom only two have been believed. They are Lurkhur (P.W. 1) and Smt. Mangani (P.W. 2) the wife of the deceased. Three other witnesses, Ram Saran (P.W. 4), Ram Dular (P.W. 5) and Ram Swaroop (P.W. 6) were also examined. They stated that they were passing that way and saw the assault. Dular and Ramswaroop were disbelieved as to the actual assault, because when they saw the deceased he had already fallen on the ground. Ram Saran was disbelieved because in the committing court he had deposed that he had only seen Sadhai although in the Court of Sessions he named both the youngmen as the assailants. Baul, of course, admitted his presence, but his son Sadhai pleaded *alibi*. His statement was that he had left with the corpse of the mother of one Marwari for Jhusi to attend the cremation and returned by train at 7.30 p.m. He came from the station on the 'hearse car' and alighted at the police station house when he was arrested. He examined one witness in support of this statement. This witness was his companion on this trip.

The Sessions Judge disbelieved the evidence of *alibi* and accepted the evidence of the eye-witnesses. He convicted all the accused under ss. 302 read with s. 34, Indian Penal Code and sentenced them to imprisonment for life. On appeal, Ramdeo was acquitted and the conviction of Baul was altered to s. 325 read with s. 109 and he was sentenced to five years' rigorous imprisonment. The conviction and sentence of Sadhai were maintained but the conviction was altered from s. 302/34 to s. 302 *simpliciter*.

In this appeal Mr. P. K. Chakravarty has raised two points which are the only points to be considered because this Court, in an appeal by special leave where the two courts below have concurred in their conclusions, does not ordinarily reassess the evidence. The first is that the High Court did not consider the evidence of *alibi* at all. The High Court mentioned the *alibi* but did not consider it in its judgment. It may be that having accepted the evidence of the eye-witnesses the High Court did not feel

- A it necessary to say that the evidence of *alibi* was not accepted by it. In view of the fact that no reference was made to the evidence of *alibi* we had that evidence brought to our notice and compared it with the evidence of the eye-witnesses. We think that the evidence of *alibi* cannot be accepted. The Sub Inspector has quite clearly deposed that Sadhai was arrested at about 10 p.m. and not at 7.30 p.m. as Sadhai alleges. Further, if Sadhai had gone to attend a cremation ceremony, he would have numerous persons to support his *alibi* and his reliance on a solitary witness whose deposition does not impress us goes against him. Even this sole witness said nothing more than this that he went to the cremation and returned with the accused on the train. In these circumstances we agree with the Sessions Judge that the evidence of *alibi* was not satisfactory and did not displace the evidence of the eye-witnesses.

- The next submission of Mr. Chakravarty needs some attention. According to Mr. Chakravarty the offence charged against Sadhai was commission of murder in furtherance of the common intention of two persons, that is, himself and Ramdeo. The Sessions Judge held that both had taken part in the assault in furtherance of a common intention and logically the Sessions Judge was right in his conclusion that if there was a common intention both Sadhai and Ramdeo were responsible for the offence of murder. When the High Court acquitted the other accused (Ramdeo) the High Court converted the conviction from s. 302/34 to s. 302 *simpliciter*. In other words, the High Court held Sadhai responsible for all the injuries which had been caused to the deceased. Mr. Chakravarty submits that in a case of this type where four blows were hit on the head by two persons it would be difficult to say who hit which blow and whether whose blow or blows was responsible for the fracture of the skull. He contends that if s. 34 was available this argument would not be open, but in the absence of common intention the prosecution case cannot be held proved against Sadhai and he made responsible for all that was caused to the deceased. He submits that there should be some evidence to show that the injury which Sadhai caused to the deceased was at least one of the two major injuries and not one of the two minor injuries. According to him this raises a doubt in his case and Sadhai's offence cannot be nuder s. 302 *simpliciter*.

- No doubt the original prosecution case showed that Sadhai and Ramdeo both hit the deceased on the head with their *lathies*. One is tempted to divide the two fatal injuries between the two assailants and to hold that one each was caused by them. If there was common intention established in the case the prosecution would not have been required to prove which of the injuries was caused by which assailant. But when common intention is not proved the prosecution must establish the exact nature of the

injury caused by each accused and more so in this case when one of the accused has got the benefit of the doubt and has been acquitted. It cannot, therefore, be postulated that Sadhai alone caused all the injuries on the head of the deceased. Once that position arises the doubt remains as to whether the injuries caused by Sadhai were of the character which would bring his case within s. 302. It may be that the effect of the first blow became more prominent because another blow landing immediately after it caused more fractures to the skull than the first blow had caused. These doubts prompt us to give the benefit of doubt to Sadhai. We think that his conviction can be safely rested under s. 325 of the Indian Penal Code, but it is difficult to hold in a case of this type that his guilt amounts to murder *simpliciter* because he must be held responsible for all the injuries that were caused to the deceased. We convict him instead of s. 302 for an offence under s. 325, Indian Penal Code and set aside the sentence of imprisonment for life and instead sentence him to rigorous imprisonment for seven years.

As regards Baul his instigation was likely to result in the kind of injury which was caused to the deceased. The least that could have happened was a grievous injury. In these circumstances, we do not think that there is any room for interference in his case. His appeal must therefore be dismissed.

The appeal is therefore allowed in respect of Sadhai to the extent indicated above and dismissed as to Baul.

V.P.S.

*Appeal allowed in part.*