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NINAJI RAOJI BOUDHA & ANR.

v.

STATE OF MAHARASHTRA

February 20, 1976

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[R. S. SARKARIA AND P. N. SHINGHAL, JJ.]

Indian Penal Code (Act 45 of 1860) s. 34—Common intention—Evidence showing only intention to cause grievous hurt—Victim dying but no evidence as to who caused the only fatal injury—If accused could be convicted under ss. 302 and 34.

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Nine accused were charged with offences of murder and causing hurt. The trial Court acquitted two and convicted the others under ss. 325 and 147, I.P.C. On appeal by the State, the High Court convicted the two appellants also under s. 302 read with s. 34, I.P.C.

Partly allowing their appeal to this Court,

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HELD : The High Court has not examined the liability of the accused with due regard to the facts and circumstances of the case. Instead of giving a categorical finding, the High Court stated at one place in its judgment that the appellants must be taken to have had the knowledge that the injury which they intended to cause to the victim was "likely to result" in his death, and in another place, that the appellants were guilty of an offence under s. 300, fourthly, because they "ought to have known that their act was so imminently dangerous having regard to the age and condition of the victim that their act must in all probability cause death or such bodily injury as is likely to cause death." But the evidence on record shows that the appellants did not have the common intention of giving a beating to the deceased when they reached his house but were only bent upon settling scores with his son. It was only when the deceased asked another witness to get ready a bullock cart for making a complaint about the beating of his son that the appellants inflicted injuries on him. But there was nothing to show that their intention was to inflict any fatal injury. Only one of the injuries was a forceful blow on the head of the deceased and it resulted in his death. But the other injuries were on the back of the neck, knees and right elbow of the deceased and not on any vital part of the body. Therefore, the appellants had only the common intention of causing grievous hurt. Since there was no reliable evidence to show which of the two appellants gave the fatal blow, the appellants could only be convicted of an offence under s. 325 read with s. 34, I.P.C. [431F; 432C-D, F-G; 433E-434C]

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 181 of 1971

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Appeal by special leave from the judgment and order dated the 25th and 28th September, 1970 of the Bombay High Court Nagpur Bench in Criminal Appeal No. 24 of 1968 with CrI. A. No. 100 of 1968.

Harjinder Singh, for the appellant

S. B. Wad and M. N. Shroff, for the respondent

The Judgment of the Court was delivered by

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SHINGHAL, J.—This is an appeal of Ninaji Raoji Boudha (hereinafter referred to as Ninaji) and Raoji Gianu Boudha (hereinafter referred to as Raoji), against the appellate judgment of the Bombay High Court dated September 25/28, 1970. The Additional Sessions

Judge of Khamgaon convicted them of offences under ss. 325 and 147 I.P.C. and sentenced them to rigorous imprisonment for five years and a fine of Rs. 50/- for the offence under s. 325, and to rigorous imprisonment for six months and a fine of Rs. 25/- for the offence under s. 147 I.P.C. The High Court held, on appeal, that they were guilty of the offence under s. 302 read with s. 34 I.P.C. and sentenced them to imprisonment for life by setting aside their acquittal for the offence of murder of Bhonaji. Ninaji and Raoji were also convicted for an offence under s. 325 read with s. 149 I.P.C. for participating in the unlawful assembly which was held to be responsible for causing grievous injuries to Bhonaji's sons Samadhan and Rambhau, Mr. Harjinder Singh, Amicus Curiae, stated on behalf of the appellants that he did not think it worthwhile challenging the conviction of appellants Ninaji and Raoji for that offence, and that he would confine the appeal to their conviction for the offence under s. 302/34 I.P.C. for causing the death of Bhonaji. We would therefore concern ourselves with the incident which resulted in Bhonaji's death and the conviction of the appellants therefor.

Appellants Ninaji and Raoji were two out of nine accused who were challaned for the commission of various offences in an incident which took place in mauza Narkhed in Buldana district on September 29, 1966, as a result of some petty quarrel between Bhonaji and his sons Samadhan and Rambhau on the one hand and the appellants and their party on the other. It was alleged that on September 29, 1966, at about 6 p.m., there was a quarrel between the two factions at 'Gothan', near the house of Bhonaji, because of the impounding of a she buffalo of Ananda (who was one of the nine accused in the case) by Bhonaji's third son Madhukar and of the cow of Ninaji's nephew Narain. It was alleged that the nine accused, including the present appellants, went to 'gothan'. There was some altercation between accused Ananda and Samadhan and the parties beat each other. Samadhan and his relations then went to their house, which was close by. Samadhan, who had received some injuries at 'gothan', went inside his house to dress them up. His father Bhonaji sat on an 'oota' in front of the house. It is alleged that appellants Ninaji and Raoji, and accused Parashram, gave a beating to Bhonaji at the oota as a result of which he fell down, and the remaining accused forcibly took Samadhan to a place near the house of one Trimbak and beat him there. Reports of the incident were lodged at the police station. Bhonaji succumbed to his injuries on October 2, 1966. The police investigated and challaned nine accused including appellants Ninaji and Raoji. The Additional Sessions Judge convicted them all, but acquitted Parashram and Ram Das. While accused Ninaji and Raoji were convicted and sentenced as aforesaid, the remaining five accused were convicted and sentenced for offences under ss. 325 and 147 I.P.C. or/and 325/149 and 147 I.P.C. As has been stated, this appeal is by Ninaji and Raoji in regard to the incident which took place in front of the house of Bhonaji and resulted in his death.

It has been argued by Mr. Harjinder Singh that in its appellate judgment the High Court lost sight of the fact that Bhonaji was present

A at the incident which took place at 'gothan', and that it erred in thinking that there was another incident in front of the house of Bhonaji and that he was fatally beaten there while sitting in his 'oota'.

B We have been taken through the evidence on the record, and we find that there is no justification for the argument that the fatal injury was caused to Bhonaji at 'gothan', and not in front of his house. We have gone through the appellate judgment of the High Court, and we are satisfied that while Bhonaji's house was quite near the 'gothan', there can be no doubt that the accused went to his house, after the beating which had taken place at 'gothan'. As we shall show in a while, there is also satisfactory evidence to prove that Bhonaji was sitting in front of his house when he was beaten there.

C The other argument of Mr. Harjinder Singh, which however requires serious consideration, is whether the appellants Ninaji and Raoji have rightly been convicted by the High Court for the offence under s. 302 read with s. 34 I.P.C. The finding of the High Court in this respect is as follows,—

D "The evidence very clearly shows that these two persons were responsible for assaulting Bhonaji as a result of which Bhonaji died. It may be that they had in the beginning no common object or intention to assault Bhonaji but it does appear from the circumstances that these two persons, and may be Parashram, formed a common intention at that moment and both of them dealt blows on Bhonaji which were on vital parts of the body such as head and neck. The blows were given by sticks though the description of the sticks cannot be known because the sticks which have been recovered in this case cannot be said to be sticks connected with the crime as such. But from the nature of the blows which were given on the person of Bhonaji, it appears that the sticks were quite heavy and the blows of the sticks actually resulted in the death of Bhonaji. When the blows were given the accused must have intended to cause those injuries to Bhonaji. They must be taken to have knowledge that Bhonaji was an old man and on account of the blows given by these accused his death was likely to be caused, particularly when the blows were given on vital parts of the body. They must be taken to have knowledge that the injury they intended to cause to Bhonaji was likely to result in the death of Bhonaji. The post-mortem examination of Bhonaji shows that there were several fractures and fissures in the head and the blows must have been dealt with quite an amount of force. The accused Nos. 6 and 7 Ninaji and Raoji, therefore, would be guilty of an offence which would come under section 300, fourthly, because the accused Nos. 6 and 7 ought to have known that their act was so imminently dangerous having regard to the age and condition of the victim Bhonaji that their act must in all probability cause death or such bodily injury as is likely to cause death."

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A perusal of the judgment shows that while the High Court took the view, in the beginning, that the appellants had no common object or intention to assault Bhonaji, it took the view that they, and may be Parashram, "formed a common intention at that moment." It is not clear from the judgment at what moment of time such a common intention could be said to have been formed by them.

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Moreover, the High Court has taken the view that both the appellants dealt blows on vital parts of Bhonaji's body which resulted in his death and that when the blows were given the accused "must have intended to cause those injuries to Bhonaji" with the knowledge that he was an old man and his death was likely to be caused by those blows. Therefore the question which requires consideration is whether it could be said that there was any evidence to show that
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more than one blow was inflicted on any vital part of Bhonaji's body and whether both the assailants could be said to have inflicted the fatal injury with the knowledge that it was likely to cause death. The High Court has stated that the post-mortem examination showed that there were several fractures and fissures in the head and that the "blows" must have been dealt with quite an amount of force. Then it has been further held by the High Court that the accused ought to have known that their action in inflicting the injury was "so imminently dangerous" as to cause the death of an old person like Bhonaji. As
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we shall show, there is justification for the argument that in arriving at this decision the High Court misread the evidence in vital particulars and committed an apparent error of law as well.

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It is not disputed before us that there was an incident at 'gothan' where there was a beating between the parties of the accused and Samadhan, and that Samadhan and his father Bhonaji returned to their house thereafter. Samadhan (P.W.19) has himself stated that he went inside his house while his father Bhonaji sat outside, and that when he (Samadhan) was tying a towel on his head to cover the injury which had been inflicted at 'gothan', the party of the accused came to his door and called him out. Sri Ram (P.W. 5) and Sukhdev (P.W. 7) have stated much to the same effect. The evidence on record
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therefore showed that the common intention of the appellants was to settle their scores with Samadhan, and not Bhonaji. In fact the High Court has also held as follows,—

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"It does not appear that any of these persons had initially any idea of assaulting either Bhonaji or Rambhau, but they seemed to be only after Samadhan. While Samadhan was being asked to come out of the house, the deceased Bhonaji must have abused or said something which infuriated some of the accused persons and it is on account of this, it appears that Ninaji and Raoji and perhaps Parashram directed their attention to Bhonaji."

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It cannot therefore be said that the common intention of the accused was to cause the death of Bhonaji. In fact the statement of Sri Ram (P.W. 5) shows that at the time when the accused came to Bhonaji's house in search of Samadhan, Bhonaji was sitting on the platform or

- A 'oota'. Sukhdev (P.W. 7) has also stated to the same effect, and the statement of Samadhan (P.W. 19) also shows that his father was sitting in front of the steps of the house when they asked Samadhan to come out of the house. It is therefore quite clear that the accused did not give a beating to Bhonaji even though he was sitting on the platform outside his house. On the other hand, they passed him by, while calling Samadhan to come out. They could not therefore be said to have the common intention or object of inflicting any injury on the person of Bhonaji till then.
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- It will be recalled that the High Court has not stated at what point of time they could be said to have formed the common intention of causing the death of Bhonaji. It appears from the statements of Rambhau (P.W. 1) and Tulsi Ram (P.W. 10) that on returning from 'gothan' Bhonaji asked Tulsi Ram, who was a chowkidar, to make a report of the incident to the Patil and also to get a bullock cart ready for going to the police station. That appears to be the point of time when the accused diverted their attention to him and gave him a beating, but there is nothing to show that their intention was to inflict any fatal injury. As has been stated, the High Court has taken the view that more than one blow was given on vital parts of Bhonaji's body and that caused several fractures and fissures in the head.
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- We have examined the correctness of that finding. It has been stated by Dr. Garge (P.W. 40) that he performed the post-mortem examination on the dead body of Bhonaji and that on external examination he noticed only one contusion 2" in diameter on the right temporal region of the head. He made an internal examination and found that there was a depressed fracture of the skull, partly of the right temporal bone and right parietal bone, and fissured fractures of the left parietal, frontal and occipital bones the lines of which were "starting from the border of depressed fracture No. (1) and going away in different bones." The witness stated further that the depressed and fissured fractures were "due to blow by some hard and blunt substance, or by a fall from height with head downwards on a hard substance." It is therefore quite clear that there was only one blow on the head which caused Bhonaji's death, and the High Court misread the evidence in taking the view that more than one blow was given on the head of the deceased.
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- This has made it necessary for us to examine the further question whether the High Court was justified in holding that both the appellants were guilty of the offence under s. 302 read with s. 34 I.P.C. Here again, we find that the evidence on the record has not been read correctly. Smt. Kalawati (P.W. 2), Smt. Deoki Bai (P.W. 3), Sri Ram (P.W. 5) and Sukhdev (P.W. 7) have been examined as eye witnesses of the beating which was given to Bhonaji. The High Court has held that their evidence was "acceptable", and that there was "nothing to cast any doubt" on their evidence. Smt. Kalawati (P.W. 2) stated in the trial court that appellant Ninaji gave two blows to Bhonaji with a stick, but did not state on what parts of the body those blows were inflicted. She stated further that appellant Raoji gave a
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blow with a stick on Bhonaji's back, near the neck. She however admitted during her cross-examination that she could not explain why she did not mention in her statement to the police that Ninaji and Raoji gave blows on any particular part of Bhonaji's body. Her statement could not therefore go to prove that appellants Ninaji and Raoji inflicted injuries on the head of the deceased. We have examined the statement of Smt. Deoki Bai (P.W. 3) also. She is the daughter-in-law of the deceased, being the wife of Rambhau. She stated that she had heard the noise, but came out only after feeding her child and saw that Bhonaji had fallen down on his face and the appellants were running away. While her statement may go to prove the presence of the appellants at the place of incident, it does not prove that both of them dealt blows on the head of the deceased. Sri Ram (P.W. 5) stated that appellant Ninaji gave two blows with a stick on the head of Bhonaji, and that appellant Raoji gave a blow with a 'khunt' near his neck. In his cross-examination he admitted that he did not state before the police about the place where the appellants dealt blows with their sticks on the person of Bhonaji. His statement could not also therefore prove the infliction of blows by both the appellants on the head of the deceased. That leaves the statement of Sukhdev (P.W. 7) for consideration. He merely stated that while he could not state the exact number of the accused or their features, he saw that, out of seven or eight persons, three beat Bhonaji with sticks. He did not state about the infliction of any injury on the head, by any of the appellants. It would thus appear that the High Court could not possibly have reached the conclusion, on the basis of the statements of Smt. Kalawati (P.W. 2), Smt. Deoki Bai (P.W. 3), Sri Ram (P.W. 5) and Sukhdev (P.W. 7) that more than one blow was inflicted on the head of the deceased, or that the one blow which was found there as a result of the post-mortem examination was inflicted by the one or the other of the two appellants.

The evidence on record therefore went to show that the appellants did not have the common intention of giving a beating to Bhonaji when they reached his house for, as has been shown, they found him sitting outside the house on his 'oota' but passed him by in search of Samadhan who was dressing his injuries inside the house. Bhonaji asked Tulsī Ram Chowkidar to make a report and to get ready a bullock cart for going to the police station. It was then that injuries were inflicted on his person by the appellants Ninaji and Raoji. Out of those injuries, one was a forceful blow on the head which caused a depressed fracture and fissures all over, and resulted in the ultimate death of Bhonaji. The other injuries were on the neck (back side), knees and the right elbow of the deceased and were simple injuries. As has been shown, there was no reliable evidence on the record to prove whether the fatal blow on the head was caused by Ninaji or Raoji. The other blows did not fall on any vital part of the body and, in the absence of evidence to establish that their common intention was to cause death, it appears that the appellants had the common intention of causing grievous injury with the lathi and the 'khunt'. They could therefore be convicted of an offence under s. 325 read with s. 34 I.P.C. and not s. 302 read with s. 34 I.P.C.

- A** It may also be mentioned that while the High Court stated at one place that the appellants must be taken to have the knowledge that the injury which they intended to cause to Bhonaji was "likely to result" in his death, it observed at another place that the appellants were guilty of an offence falling under section 300, fourthly, because they "ought to have known that their act was so imminently dangerous having regard to the age and condition of the victim Bhonaji that their act must in all probability cause death or such bodily injury as is likely to cause death." No categorical finding has therefore been given by the High Court one way or the other. On the other hand, as has been shown, the liability of the accused has not been examined with due regard to the facts and circumstances which had been clearly established on the record and to which reference has been made above.
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- C** The appeal is therefore allowed to the extent that the conviction of the appellants Ninaji and Raoji is altered from section 302/34 I.P.C. to one under section 325/34 I.P.C. and they are sentenced to rigorous imprisonment for five years thereunder. Their sentences shall run concurrently.

V.P.S.

Appeal allowed in part.