

A

BHABA NANDA SARMA & ORS.

v.

THE STATE OF ASSAM

October 12, 1977

[P. K. GOSWAMI, N. L. UNTWALIA AND D. A. DESAI, JJ.]

B

Indian Penal Code, S. 34 vis-a-vis s. 38—Assault by common intention to cause injury likely to result in death—Development of further common intention among some assailants to commit murder—Liability for murder whether shared by all participants under s. 34.

C

The three appellants assaulted deceased Shashi Mohan with the common intention to cause injury likely to result in his death, but during the assault, two of them developed a further common intention of murdering him. The sessions Court tried the appellants for charges u/ss. 302/34 and ss. 323/34 I.P.C. but giving them the benefit of doubt, acquitted them. In a State appeal, the High Court set aside the acquittal order, and convicted all the assailants sentencing them for life.

D

This Court considered the question whether the conviction of all the three appellants u/s. 302 with aid of s. 34 I.P.C. was justified in law, and partly allowing only the appeal of Bhaba Nanda Sarma.

HELD :—Applying the principle of law under s. 38 of the Penal Code, the case of Bhaba Nanda can be separated from that of his two brothers. He shared their common intention to assault, with the knowledge that it was likely to result in death but while committing the act in furtherance of that common intention, the other two developed and shared the common intention of causing the murder. Bhaba Nanda can, therefore, be held guilty only u/s. 304 Part II while the other two appellants are liable for the murder with the aid of s. 34 of the Penal Code. [717 G—H, 718 A—B]

E

Afrahim Sheikh and Ors. v. State of West Bengal [1964] 6 S.C.R. 172 referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 155 of 1972.

Appeal by Special Leave from the Judgment and Order dated the 24-11-1971 of the Assam and Nagaland High Court at Gauhati in Criminal Appeal No. 20 of 1968.

F

S. K. Nandy for the Appellants.

S. N. Choudhary for the Respondent.

The Judgment of the Court was delivered by

G

UNTWALIA, J.—This is an appeal under section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 by three persons who are brothers. On the 10th of November, 1967 at about 7.00 A. M. an occurrence took place in a village near Barpeta in Assam. The prosecution case was that Shashi Mohan Sarma, a person who lost his life as a result of the assault on him, in the company of his elder brother Gopi Nath Sarma, P.W. 2, was proceeding to his field with some mustard seeds in a basket. Gopi Nath was going with some cattle to tether them in the field. When they proceeded to some distance Shashi Mohan was chased by the three appellants, appellant Bhaba Nanda Sarma who was aged about 20 years at the time of the occur-

H

rence was armed with a lathi, appellant Phanidhar Sarma had a *dolibari* (a wooden hammer with long handle) and appellant Harendra Nath Sarma carried an iron rod in his hand. They all chased Shashi Mohan. Shashi Mohan ran towards his brother Gopi Nath raising alarm. Bhaba Nanda caught hold of both the hands of Shashi Mohan from behind. Thereupon, Phanidhar gave him a blow on his head with the *dolibari*. Shashi Mohan fell down. Thereafter Harendra struck Shashi Mohan on his head and other parts of his body with the iron rod. Gopi Nath tried to intervene. Bhaba Nanda caught hold of Gopi Nath also. Harendra assaulted him with the iron rod causing injuries. Shashi Mohan was taken to the hospital where he died at about 3.00 A.M. on the 11th of November, 1967 as a result of severe injuries caused to him by Phanidhar and Harendra. The injuries inflicted on Gopi Nath were all simple in nature. After charge-sheet by the police and committal by the Magistrate, the appellants were tried in the Sessions Court for charges under section 302 read with section 34 and section 323 read with section 34 of the Indian Penal Code. The Trial Judge gave them the benefit of doubt and acquitted them. The State of Assam filed an appeal in the High Court of Gauhati. The High Court set aside the order of acquittal, convicted all the three appellants for the offence of murder of Shashi Mohan with the aid of section 34 and sentenced each of them to imprisonment for life. Their conviction under section 323 read with section 34 was also recorded by the High Court but no separate sentence was imposed. Hence this appeal.

The eye witnesses of the occurrence were P.W. 2 Gopi Nath Sarma; P.W. 3 Danesh Ali; P.W. 4 Nur Mohammad and P.W. 6 Kurpan Ali. The High Court in its judgment has catalogued the main five reasons which led the Sessions Judge to make an order of acquittal in favour of the appellants. In our opinion the High Court was right in reversing the judgment of the Trial Judge and interfering with the order of acquittal. It did so well within the limits of its power and the law as enunciated by this Court in several decisions. The four reasons given by the learned Sessions Judge were of a flimsy nature. It did not justify the entertaining of any doubt in regard to the prosecution story on the basis of these reasons. One of the five reasons was that the P.Ws did not state about the injuries of Bhaba Nanda and they were not explained by the prosecution. In our opinion the High Court has rightly not attached much significance to the alleged failure of the prosecution to explain the injuries on Bhaba Nanda. The injuries on his person were of a very minor nature, three of them being ecchymosis and one swelling of the root of right index finger. The evidence of the Doctor D.W. 1 was not sufficient to prove that the injury on the right index finger was grievous in nature. The ecchymosis inquiries however, were all very simple. Bhaba Nanda did not claim in his statement under section 342 of the Code of Criminal Procedure, 1898 as to with what weapon the injuries were caused on his person. He merely said that Gopinath and Shashi gave blows on his back. He did not attribute the right index finger injury as having been caused by either of the two. No defence witness was examined to give any counter version of the occurrence. Bhaba Nanda did not show his injuries to the Investigating Officer, as is apparent from his evidence, when he arrested him soon after the occurrence. No counter information

- A** was lodged with the police nor any counter case filed. In a case of this nature before an adverse inference is drawn against the prosecution for its alleged suppression or failure to explain the injuries on the person of an accused, it must be reasonably shown that, in all probability, the injuries were caused to him in the same occurrence or as a part of the same transaction in which the victims on the side of the prosecution were injured. The prosecution is not obliged to explain the injuries on the person of an accused in all cases and in all circumstances. This is not the law. It all depends upon the facts and circumstances of each case whether the prosecution case becomes reasonably doubtful for its failure to explain the injuries on the accused. In the instant case the Sessions Judge was not justified in doubting the truth of the version given by the eye witnesses—three of whom were wholly independent witnesses. Gopi Nath was surely present on the scene of the occurrence as he himself had received the injuries in the same transaction. The High Court has rightly believed the testimony of the eye witnesses.

The question for consideration, however, is whether the conviction of all the three appellants under section 302 with the aid of section 34 of the Penal Code is justified in law.

- D.** To attract the application of section 34 it must be established beyond any shadow of doubt that the criminal act was done by several persons in furtherance of the common intention of all. In other words, the prosecution must prove facts to justify an inference that all the participants of the act had shared a common intention to commit the criminal act which was finally committed by one or more of the participants. Section 38 of the Penal Code says :—

- E** “Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that Act.”

In *Afrachim Sheikh and others v. State of West Bengal*⁽¹⁾ Hidayatullah J. as he then was, has pointed out that it was possible to apply the ingredients of section 34 in relation to the commission of an offence under section 304 Part II, even though death is caused with the knowledge of the persons participating in the occurrence that by their act death was likely to be caused. The sharing of the common intention, as pointed out in that case, is the commission of the act or acts by which death was occasioned. With reference to section 38, the learned Judge observed at page 178 :

- G** “That is to say, even though several persons may do a single criminal act, the responsibility may vary according to the degree of their participation. The illustration which is given clearly brings out that point.

- H**
 Lastly section 38 provides that the responsibility for the completed criminal act may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention common or otherwise or knowledge.”

(1) [1964] 6 S.C.R. 172.

The injuries found on the person of the deceased by P. W. 5 Dr. S. Kalita, who held the autopsy over the dead body were of a very severe nature. The fatal injuries in particular were the three head injuries. According to the consistent version of the prosecution—one was caused by Phanidhar with the *dolibari* and the other two were inflicted by Harendra with the iron rod. Harendra is also said to have caused the other injuries found on the person of Shashi Mohan. The result of the three head injuries was fracture of the occipital bone into six pieces and fracture of the right parietal bone 2" in length. In the opinion of the Doctor the death was due to coma as a result of intracranial haemorrhage caused by the injuries sustained by the victim. The two authors of the injuries, namely, Phanidhar and Harendra, therefore, undoubtedly had shared the common intention of causing such bodily injuries to Shashi Mohan which were sufficient in the ordinary course of nature to cause his death. In other words, his death was as a result of the criminal acts committed by the said two appellants in furtherance of their common intention. There cannot be any doubt about it. Their liability for the murder of Shashi Mohan with the aid of section 34 of the Penal Code is fully established. The case of Bhaba Nanda, however, stands on a different footing and can justifiably be separated from that of the other two appellants.

On the evidence of Gopi Nath himself the result aforesaid follows. Shashi Mohan had reached near him and when he tried to obstruct the accused and prevent them from committing the assault on Shashi Mohan Harendra said "we have met enemy today, need not be freed". Thereupon Bhaba Nanda caught hold of the hands of Shashi Mohan from behind. Phanidhar then gave him the blow on the head, as already stated, with the *dolibari*. Harendra gave further blows on his head and other parts of his body after Shashi fell down. On these facts it is difficult to conclude that Bhaba Nanda caught hold of the hands of Shashi sharing the common intention of Phanidhar and Harendra of causing the death of Shashi. He did not utter a word which would justify such a conclusion. He must be aware that his two elder brothers Phanidhar and Harendra were going to assault Shashi with their respective weapons in their hands. Bhaba Nanda did not use his lathi for causing any injuries on Shashi. The first blow was given by Phanidhar. Thereupon Shashi fell down. Bhaba Nanda's intention, therefore, was to join in the commission of the acts by the other two with the intention of getting Shashi assaulted severely with the knowledge that such an assault in all probability and likelihood might result in the death of Shashi. His participation in the crime, therefore, did not take him to the extent of the sharing of the common intention to cause his murder. As we have said above, Phanidhar and Harendra undoubtedly shared such an intention as is apparent from the manner of assault by them on Shashi and the severity and force with which the blows were given on his head by both of them with the respective weapons in their hands. Applying the principle of law under section 38 of the Penal Code, therefore, the case of Bhaba Nanda can be separated from that of the other two. He can be held guilty only under section 304 Part II as he had intentionally joined in the commission of an act with the knowledge that the assault on Shashi was likely to result in his death. The facts of this case indicate that Bhaba Nanda

A shared the common intention of his other two brothers for the commission of a lesser offence than murder. But while committing the act in furtherance of that common intention, Phanidhar and Harendra developed and shared the common intention of causing his murder.

B For the reasons stated above, the appeal of appellants Phanidhar and Harendra is dismissed. The appeal of Bhaba Nanda is partly allowed. His conviction is altered from sections 302/34 to section 304 Part II read with section 34. The sentence of life imprisonment imposed on him is altered to rigorous imprisonment for 7 years only. The conviction of all the appellants under sections 323/34 is also maintained.

M.R.

Appeal allowed in part.