

## Ahamed Ali Khan and Another Vs State of Rajasthan

**Court:** Rajasthan High Court

**Date of Decision:** Nov. 6, 1985

**Acts Referred:** Penal Code, 1860 (IPC) â€” Section 302, 323, 34, 379

**Citation:** (1989) WLN 534

**Hon'ble Judges:** Milap Chand Jain, J; Jasraj Chopra, J

**Bench:** Division Bench

### Judgement

J.R. Chopra, J.

The appellants Ahamed Ali Khan and Rahamat Ali have been convicted of the offence u/s 302/34, IPC and have been sentenced to imprisonment for life by the Additional Sessions Judge, Churu by his judgment dated December 23, 1974.

2. The prosecution case in brief is that Sadulekhan PW 8 and Mukkarab Khan are the real brothers, the deceased Nathu Khan was the son of

Sadulekhand, accused Ahmed Ali and Nizam Ali are the son of Mukarab Khan. There was some dispute between Mukarab Khan on the one side

and Rahamat Ali and Ahamed Ali on the other side in connection with passage of water through the water course. In that connection permission

was obtained by Mahaboob Khan and he had put up a Nali which was removed by the accused persons. In that matter deceased Nathu Khan

had supported Mahaboob Khan and as such the relations between the deceased and Ahamed Ali and Rehmat Ali had become stained. It is

alleged that on 8-7-1974 Ahamed Ali and Nathu Khan were at Churu, Ahmed Ali was serving in the PWD as mistry and Nathu Khan was a

labourer. They used to come from Bissau on cycles. Balu Khan PW 2 is the brother-in-law of the deceased Nathu Khan and is residing at Churu.

Balu khan had seen Nathu Khan as well as Ahamed Ali at about 5.15 p.m. of 8-7-1974 in the Bazar near Peepal-gate Rameshwar Dholi of

Ramsara was also present at that place. He asked them not to quarrel with each other and thereafter Nathukhan had left the place and Ahmed Ali

followed him for Bissau. The prosecution story further proceeds that Sampatram PW 1 who was a TB Patient had gone to Bissau from Churu

which is at a distance of 9 miles. He had gone to Bissau in connection with getting himself examined by some Vaidya and on that date he was

returning from Bissau. At about 5.45 p m. he reached Balarsar bus stand at a distance of two miles from Bissau and seven miles from Churu. He

observed both the accused persons giving slaps, kicks and fist blows to Nathu Khan. Nathu Khan was known to him from before. He asked the

accused persons not to beat Nathu Khan thereupon he himself was threatened. He then left the place and went to Churu and informed about the

occurrence to Balu Khan and both of them went to the place of occurrence and saw Nathu Khan lying dead at the bus stand. The both of them

returned to Churu. As Balu Khan was not a cyclist and on being asked by him Sampatram took him to the Police Station on his cycle and left him

out side the Police Station. Balu Khan then went inside the Police Station and lodged the report Ex. P 2. On this report a case u/s 302, IPC was

registered by Munshi Ram PW 3 who was Incharge of the Police Station Churu recorded the statement of Balu khan and on the next day Shivdan

Singh undertook the investigation from him. Shivdan Singh PW 18 was the second officer. He visited the spot on 9-7-1974 and conducted the

investigation and found the cycle of the deceased along with some bags and his chappals were also found at the spot. Autopsy was conducted on

the dead body of the deceased by Dr. K.L. Gupta, PW 17. He found the following injuries on the person of Nathu Khan.

(a) There was a well defined mark of the size the lateral and of which was 7"" and the medial and was 3"". It was extending from the right sternum

mastoid muscle about 1"" on the left of mid line. The above down-ward entrusion was from the abdomen prominence to the right clavicle inner

2/3rd portion. One over the ligature skin was dried up looked like parchment paper,

(b)(i) Bruises on both scrotum of the size of 2"" x 2"" on either side of mid line;

(ii) Bruises at the root of penis 2"" x 2"";

(iii) Bruises in an area 3"" x 3"" on left ingual region;

(iv) Abrasion over the left lumber region posteriorly 4"" x 4"";

(v) Abrasion 1/2"" x 1/2"" over the left maleous;

(c)(i) Blood stains present over the face left cheek;

(ii) Blood foam coming from both the nostrils;

(iii) Tongue was swollen and protruding from the mouth.

According to Dr. Gupta there was extra vasaction of blood in the subcutaneous tissue and the muscles of the neck under the area described above

under injury (a). He further stated that there was a longitudinal tear in the larynx and trachea of about 3"" in length. The hyoid bone was broken

slightly on the right of the mid line. The inner lining of the trachea and larynx was congested. He further found both the testines were bruised and

having haematoma of the size of 1" x over the antero medical aspect. In his opinion death was caused by asphyxia due to strangulation and injury of

trachea and larynx was sufficient to cause death instantaneously in the ordinary course of nature. Both the accused persons were arrested on 15-7-

1974. Rehmat Ali was committed to judicial custody on 16-7-1974 and he was got identified by the witness PW 1 Sampat Ram. Investigation

was conducted from the witnesses and after completion of investigation charge sheet was presented against the accused person who were

ultimately committed to the court of Additional Sessions Judge for trial Both the accused persons were charged for the offence u/s 302/34 IPC.

They bow ever not pleaded guilty and claimed to be tried. At the trial the prosecution in all examined 18 witnesses. After recording the statements

of the accused three witnesses were examined in defence. The learned Additional Sessions Judge after hearing the argument found both the

accused guilty u/s 302/34 PC and convicted and sentenced both as aforesaid. Dissatisfied by their conviction and sentence the present appeal has

been filed.

3. We have heard Shri V.D. Calla learned Counsel for the appellants and Shri L.S. Udawat, learned Public Prosecutor for the State, Shri V.D.

Calla first of all submitted that it is a case of no evidence. The learned Additional Sessions Judge was wrong in placing reliance on the testimony of

Sampatram as an eye witness. Even Sampatram has not stated that out of the two accused persons who bad strangulated the deceased. His

testimony is only to this effect that when he was passing by the side of the bus stand he observed that accused persons giving fists, slaps and kick

blows and thereafter he proceeded to inform Balu khan PW 2. He stressed if the statement of Sampat Ram is perused as a whole, it would

transpire that his testimony is not credible. He pointed out that Sampat Ram is a T.B. Patient. He had come to Bissau after cycling upto nine miles.

While coming to Churu he returned back along with Balu Khan 7 miles and from the place of occurrence both of them again returned to Churu

covering seven miles. A.T.B. Patient could not have travelled in this manner a long distance making two long trips on cycle. His statement also

does not appear to be believable in view of the fact that he has stated that he had not narrated the occurrence to anyone except Balukhan. This

aspect of statement also cannot be ignored. He has deposed that he had gone to Bissau in contention with his examination by some Vaidoa. He

was not the patient of that Vaidya and he did not know the name of the Vaidya. This version thus given by the accused that he proceeded to

Bissau in connection with his examination by some Vaidya does not appear to be true and the whole of the version appears to be cooked up one.

If reliance is not placed on the testimony of Sampat Ram then the accused persons he cannot be connected with the commission of the offence.

4. We have given our anxious consideration to the above submissions of Mr. Calla and we have also perused the statement of Sampatram. What

was weighed with us is that the whole story gets revealed through him. It is he who narrated the occurrence to Balu Khan and the report came to

be lodged in pursuance of the information given by Sampatram to Balu Khan Regarding the credibility of the testimony of PW 1 Sampatram the

Statement of PW 2 Balukhan is also to be looked into. If we disbelieve the testimony of Balukhan on this aspect of the case, then only it can be

said that reliance cannot be placed on the testimony of Sampat Ram. Balu Khan in this First Information Report has come out with the story as

stated by Sampat Ram This information finds place in the FIR, as to how Ballukhan came to know of the occurrence. It finds mention in the FIR

that Sampatram had come to his house and informed that he had seen accused Ahmed along with one unknown person inflicting blows on his

brother in law Nathu Khan and the time of occurrence was also narrated by Sampatram to Ballu Khan which finds mention in the FIR. It also finds

mention the FIR that both of them went back to the place of occurrence on the cycle of Sampatram and saw the dead body and both of them

returned from there. Sampat Ram being the source of information to Ballu Khan and Ballu Khan's testimony on this score in our opinion can be

disbelieved. That being so, it cannot be found that Sampatram had not visited Ballu Khan and was not returning back from Bissau at the relevant

time. Nothing has come in the testimony of Sampatram of which it can be said that he had any grudge against the accused persons or was in any

way interested in the deceased. Ballu Khan is no doubt is a mistry in the PWD office Churu and Sampatram is also serving the same department

can be no reason to come out against the accused persons. With regard to the testimony of to Sampatram it has also been pointed out that his

testimony is such on the basis of which reliance should not be placed on his testimony. He was prosecuted by the Department u/s 379 IPC for

having committed theft of the departmental property and besides that he was also prosecuted for committed murder of the husband of

Parmeshwari whom he subsequently married. In that murder case he was acquitted and in the prosecution for the offence u/s 379 he was

suspended. It was also pointed out that attendance of PW 1 Sampatram in the PWD register on the relevant date shows that there is over writing.

Being under suspension there was no need for him to have attended the office. This criticism regarding his attendance in the office again has to be

viewed in the light of what we have discussed that he is the source of information and on that basis his statement cannot be said to be concocted

one. Therefore, reliance can be placed on the testimony of Sampatram but his testimony is only believable to this extent that he saw both the

accused persons giving blows in the nature of slaps, fists and kicks. His testimony does not go beyond that.

5. The question arises whether both the accused persons can be held guilty of the offence u/s 302 IPC which is a very serious question in the

present case. Admittedly there is no evidence on record that out of the two accused persons who throttled the deceased. So it is not possible to

hold any one of accused persons guilty of the offence u/s 302 IPC simpliciter, that is why the question of applicability of Section 34 IPC assumes

importance. If Section 34 IPC cannot be made applicable or its applicability is rather doubtful, then none of the accused can be held guilty u/s 302.

For the applicability of Section 34 IPC what is material is that the court has to find that both the accused persons shared the common intention to

cause the death of the deceased. If such a finding cannot be arrived at, then by the aid of Section 34 IPC the accused persons can't be held guilty

u/s 302 the applicability of Section 34 IPC the background in which occurrence has taken place is also relevant. According to the prosecution the

relation between accused Ahmed Ali and the deceased became strained on account of some dispute between Mehboob and Ahmed Ali and

Rehmat Ali. Mehboob Ali PW 7 has stated that he had put up drain pipe after obtaining permission from the Municipal Board. Bissau and in this

work Nathu Khan, father of Sadule Khan had helped him. Two-three days after fixing of the drain pipe it was broken by the accused persons and

this breaking of the pipe gave rise to some heated exchanges between them. Sadul Khan PW 8, father of the deceased has stated except this, no

quarrel ever took place between his son Nathukhan and the accused persons. He has stated that he & his son both had supported Mehboob in

the installation of drain pipe in pursuance of the permission having been obtained by Mehboob Khan from the Municipal Board. According to

Sadul Khan it is only this support by Nathu Khan which annoyed the accused persons and Nathu Khan had expressed him that the accused persons

have become angry with him and they will beat him. For the applicability of Section 34 IPC reference has also been made to the statement of

Khatoon PW 10. She has stated that after breaking of the drain pipe which resulted into exchange of words she had heard Ahmed Ali saying

Rahmat Ali alias Lala to come tomorrow at Khasuri Road. They will thrash him

bldsk dy Bhd dj nsxs

Khatoon informed her father Sadulban that Nathukhan taken place in this back-ground. In our considered opinion the background does not

supply the necessary intention to kill. The background or the motive should be commensurate with the crime but in our opinion the present

background falls far short of that. It may be that the real motive might have been concealed when according to Sadul Khan there was no other dispute

between the accused persons and deceased and no quarrel ever took place, it cannot be said that the relations between the deceased and the

accused persons were so strained so as to take away his life. If the accused persons had intended to cause the death of the deceased they would

have availed the deceased with some arms and it cannot be conceived that the manner of causing death was already decided by the accused

persons that they will cause the death by strangulation. To us it appears that all of a sudden any one of the accused throttled the deceased which

act of one of the accused persons was not shared by the other and so in our opinion in the particular circumstances of this case a common

intention cannot be attributed to the accused person that they intended to cause the death of the deceased. It may be stated that a common

intention should be found only when it is clearly made out else incalculable harm may be caused to an accused person who did not share any

common intention. Even when the applicability of Section 34 IPC is doubtful, still the benefit of such doubt has to be given to the accused. In our

opinion considering the circumstances of this case sharing of the common intention to cause death on the part of the accused persons in any case is

doubtful and so the accused persons are entitled to the benefit thereof. Thus by the applicability of Section 34 the accused persons cannot be held

guilty of the offence u/s 302 IPC. As it has not been proved who was the author of the fatal injury so none can be held guilty u/s 302 IPC but the

accused persons can only be held guilty u/s 323 IPC in the light of the evidence of Sampatram as he has deposed that injuries were inflicted by the

accused persons on the person of the deceased by way of slaps, fists and kicks as a result of which bruises and abrasions appeared on the person

of the deceased. We, therefore hold both the accused persons guilty for the offence u/s 323 IPC.

6. Accordingly the appeal is partly allowed, Convictions and sentences of the appellant for the offence u/s 302/34 IPC are set aside. They are now

ever convicted u/s 323 IPC and each of them is sentenced to one year's rigorous imprisonments. Both the accused persons have remained in

custody for more than a year. Thus they have served out the sentence. They are already on bail so they need not surrender to their bail bonds

which are hereby discharged.