

Mool Chand and Another Vs State

Court: Allahabad High Court

Date of Decision: Sept. 9, 1952

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€” Section 367, 367(5)
Penal Code, 1860 (IPC) â€” Section 302

Citation: AIR 1953 All 220 : (1952) 22 AWR 653

Hon'ble Judges: Raghubar Dayal, J; Agarwala, J

Bench: Division Bench

Advocate: C.S. Saran, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Disposed Of

Judgement

Agarwala, J.

This is an appeal by Mool Chand, aged 22 years, and Phool Chand, aged 30 years, against their conviction u/s 302 and under Sections 302/34, I. P. C. respectively and sentence of death. There is also before us the usual reference for the confirmation of the death

sentence.

2. The appellants were prosecuted along with Brij Lal and Ram Naresh under Sections 147, 148, 302 read with Section 149, I. P. C. for having

conspired together to murder one Nathey Ahir after arming themselves with deadly weapons in the company of one or two more persons and for

having committed murder of the aforesaid person at about mid-night between the 3rd and 4th August 1951 in village Bahapur, while the deceased

was sleeping on a Machan in a field. Brij Lal and Ram Naresh were acquitted by the learned Sessions Judge.

3. It appears that Mool Chand's father Lautan and Phool Chand's father Sultan were cousins. They used to cultivate a field of Rampat zamindar,

P. W. 13. Rampat ejected them by means of a suit and then cultivated the land himself for two years. In the month of Jeth or Baisakh 1951 Nathey

deceased got the land from Rampat. Mool Chand and Phool Chand did not like this. They threatened Nathey that if he did not leave the land, he

would come to harm. Brij Lal and Ram Naresh had, however, other enmity with Nathey and the prosecution case was that they conspired, with

Mool Chand and Phool Chand to murder Nathey. For the last three nights before the incident Nathey used to sleep on a Machan in his Jondhari

field in order to guard his crops in the night. In the night in question, according to the prosecution, while Nathey was sleeping on a cot on his

Machan, five or six persons including the appellants and Brij Lal and Ram Naresh attacked Nathey with garidasas. The actual attack was made by

Mool Chand and Brij Lal while Phool Chand and Ram Naresh held the feet of Nathey to facilitate his being killed, and one or two persons, who

could not be recognised, armed with lathis were standing nearby.

4. The first information report was lodged by the deceased's wife, Smt. Dhananti, at 6-30 in the morning of the 4th of August. The Sub-Inspector

Ram Adhar Singh at once proceeded to the place of occurrence and held an inquest. He found the deceased lying dead on the cot over the

Machan in a pool of blood. The accused were absconding and he searched their houses in their absence and found two bloodstained gandasas

from the house of Mool Chand in the presence of witnesses.

5. The post-mortem report revealed that the deceased had received no less than 12 injuries of which 11 were incised wounds all inflicted on right

side of chest, temple, face and neck.

6. Human blood was found on one of the gandasas, while on the other the blood was disintegrated and its origin could not be determined. The

accused pleaded not guilty. Mool Chand denied that the gandasas belonged to him or that they were recovered from his house. The recovery of

gandasas from the house of Mool Chand was, however, proved by witnesses of recovery. Smt. Dhananti, Rama Awadh, Rama Deo and Jholai,

eye-witnesses, were produced by the prosecution. Baidat and Lakhi swore that immediately after the incident they saw the accused running away

from, the scene of murder.

7. We have been taken through the evidence of the witnesses and I have no doubt in my mind that the prosecution case is fully established on the

evidence on the record. Certain discrepancies were pointed out in the statements of the witnesses but they are all minor and immaterial. There is no

reason to disbelieve the prosecution witnesses on that ground. In my opinion, guilt was brought home against the appellants and they were rightly

convicted u/s 302 read with Section 34, I. P. C.

8. It has been strongly urged that on the prosecution evidence Phool Chand was merely holding the feet of the deceased while the actual act of

inflicting injuries by a gandasa was done by Mool Chand and that, therefore, Phool Chand should be given transportation for life instead of a

sentence of death. It is also pointed out that he is only 20 years of age. In my opinion, this contention is sound and Phool Chand's death sentence

should be commuted to transportation for life.

9. I may here state the views I hold on the question of sentence in a case of murder. The penalty of death comes to us as a relic of the ancient

doctrine of vengeance which is graphically expressed as "a tooth for a tooth" and "'an eye for an eye'". Instead of allowing the injured parties

themselves to settle their disputes by taking vengeance themselves, the State intervened and took upon itself the infliction of the same punishment as

would have been inflicted by an injured person.

10. Says Holmes in his "Common Law" at pages 2 and 3:

It is commonly known that the early forms of legal procedure were grounded in vengeance. Modern writers have thought that the Roman Law,

started from the blood feud, and all the authorities agree that the German law began in that way. The feud led to the composition, at first optional,

then compulsory, by which the feud was bought off. The gradual encroachment of the composition may be traced in the Anglo-Saxon laws, and

the feud was pretty well broken up, though not extinguished, by the time of William the Conqueror. The killings and house-burnings of an earlier

day became the appeals of mayhem and arson.

11. The doctrine of revenge gave place to the doctrine of deterrent punishment. The state inflicted a particular punishment for an offence because

that punishment was considered to be a sufficient deterrent for the repetition of the crime.

12. Of late it has been found that the policy of deterrent punishment does not solve the social problem of crimes. It is now believed that a person

becomes a criminal mainly because his habits and frame of mind have been moulded in that direction by his social, environments, To prevent a

person from committing a crime, the substitution of environments which will avoid the formation of anti-social instincts and habits in a person is a

better remedy for the prevention of crime than infliction of deterrent punishment. Thus the modern doctrine is of correction or reformation rather

than punishment. The infliction of the sentence of death is a negation of reformation and, there- fore, death penalty is being abolished in several

civilised States of the world. Thus in the modern age a more humanitarian view of punishment is adopted.

13. Under the Indian Penal Code punishments are graded according to the seriousness of the crime. The doctrine of deterrent punishment is the

underlying policy of the whole scheme of punishment. At the same time, the Code allows latitude to the court to adapt the punishment to the

circumstances of each case. In most cases the Code prescribes the maximum, punishment, but does not prescribe the minimum punishment and the

latitude given to the Judge is very great. In other cases, the Code prescribes both the maximum and the minimum penalty. There is nothing in law to

prevent this discretion being exercised in consonance with the more humanitarian view of the modern age. True, Judges are not social reformers.

They are interpreters of the law and enforce it as they find it. Yet, they must of necessity move with the times, or else the justice which they seek to

do may, by change of circumstances, become inequitable.

They keep pace with the progress of time in two ways : first, by interpreting the words of the law in the light of the accepted ideas of the age and

newly discovered facts. As was observed by the Privy Council in -- "James v. Commonwealth of Australia" (1936) A. C. 573 at p. 614, the full

import and true meaning of "words"

can often be appreciated when considered as the years go on in relation to the vicissitudes of facts which from time to time emerge. It is not that

the meaning of words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

Secondly, where the law gives a discretion to the Judges they exercise that discretion so as to ensure social justice in accordance with the spirit of

the times. No Judge now, for instance, would punish a Jean Valejin who has been through hunger and penury and has seen his family starve before

his eyes, with the same severity as he would another who while in the enjoyment of plenty and prosperity has committed theft.

14. u/s 302, I. P. C. a discretion is vested in Courts either to impose a sentence of death or of transportation for life. Discretion must always be

exercised according to principles and not according to the humour of the Judge, arbitrarily or fancifully. The principle upon which discretion is to be

exercised not being fixed by any statute may be interpreted progressively in accordance with the spirit of the times so that real, and not technical

justice may be secured. To my mind, the true principle of exercising the discretion of imposing either the penalty of death or of transportation for

life should be that the sentence of death is awarded in cases in which the act is very brutal and highly repugnant to morals and the sentence of

transportation for life is imposed in all other cases.

15. There are four classes of murder as mentioned in the four clauses of Section 300, I. P. C., namely,

(a) when the intention is to kill;

(b) when the intention is not to kill but to inflict injuries which are sufficient in the ordinary course of nature to cause the death of a normal person;

(c) when the intention is not to kill but to inflict injuries, with the knowledge of the special physical condition of the person injured, such injuries

being sufficient to cause his death in that physical condition, though not sufficient to cause the death of a normal person; and

(d) when the intention is not to kill but the act is recklessly done and so imminently dangerous that it is likely to result in death or to cause injury

which is likely to cause death and the act is done without any excuse for doing it.

16. It appears to me that the sentence of death should be restricted to class (a) "intention, to cause death", because it is always brutal and

barbarous to intentionally kill another, and to classes (b), (c) and (d) when the injuries caused are brutal or the action of the accused is highly

repugnant. In other cases, a sentence of transportation for life should be imposed. Even, when death should be the ordinary penalty according to

the above classification, the lesser penalty provided by law may be imposed in certain circumstances. It is not possible to enumerate the

circumstances exhaustively or to lay down any hard and fast rule. Each case will have to be decided on its own facts.

Some of the cases in which the lesser penalty of law should be awarded may be stated:

1. Where the accused is very young or too old, I would normally consider that a young man below the age of 18 should be considered too young

to merit the death penalty and above the age of 70 to be too old for that sentence.

2. Where the accused is a young man who has, acted under the instigation or the influence of his elders, I would normally consider that a man who

has completed 20 years of age has no justification for pleading that he has acted under the instigation or the influence of his elders. He should have

by the time he attains that age enough discretion to judge for himself.

3. Where the murder is committed during the course of a sudden quarrel and without premeditation or on the impulse of the moment and the case

does not fall under any of the exceptions to Section 300.

4. When the conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband

or other mere relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying an immoral

intrigue with the woman.

5. When the liability is vicarious and the accused neither took part in the actual beating of the deceased nor instigated others to beat him.

6. Where there are several persons involved in the murder and only one death is caused and the actions of several accused are capable of being

graded in the matter of causing death. For example, where one person inflicts injuries which bring about the death and the others merely help the

former, such as by standing by or performing minor acts, the conscience of the law in such a case will be satisfied if the persons who (inflicted the

fatal injuries are sentenced to death and the others are sentenced to transportation for life, unless they were the ring-leaders of all the accused.

17. In the last category of cases mentioned above all the accused are no doubt equally guilty because all of them pre-planned the murder and their

action is brutal, but a differentiation in the sentence may be made because the person who actually wields the instrument with which he causes

death may be presumed to be more brutal than the one who merely helps in the commission of the crime.

18. I am aware that u/s 367(5), the Court is required to give reasons why the sentence of death is not passed for an offence punishable with death,

I am also aware that this, provision has been construed as implying that the sentence of death is the normal sentence and the sentence of

transportation for life is an exception. But the law does not lay down in what cases the two sentences shall be imposed and I maintain that the law

has deliberately conferred a discretion on the court to award one sentence or the other, according to the circumstances of each case. This

discretion is intended to be exercised to secure the end which the law has in view, namely, social justice. In my view the principles I have laid down

in this judgment are calculated to servo that end.

19. Applying these principles to the accused in the present case, I find that while Mool Chand appellant inflicted the gandasas injuries, Phool Chand

merely held the legs of the deceased. Phool Chand is aged 20 years only. In the circumstances, a sentence of transportation for life will meet the

ends of justice in his case.

20. I would, therefore, dismiss the appeal of Mool Chand, confirm the death sentence imposed upon him and accept the reference in his case.

21. I would dismiss the appeal of Phool Chand with this modification that instead of the sentence of death I would substitute a sentence of

transportation for life and in his case I would reject the reference.

Raghubar Dayal, J.

22. I have been through the judgment of brother Agarwala, and agree to the order proposed. I would like to note my reasons.

23. The prosecution case as put in court is that these two appellants, namely, Mool Chand and Phool Chand, together with four or five other

persons, went to the machan on which Nathey deceased was sleeping on the night between the 3rd and 4th August 1951, that the two appellants,

Brij Lal and Ram Naresh got on the machan, that Mool Chand appellant and Brij Lal struck the deceased with gandasas and Phool Chand and

Ram Naresh held certain parts of the body of the deceased, that the other persons in the party remained standing on the ground and that on the

approach of the witnesses these persons ran away. Of the six prosecution witnesses, Smt. Dhananti, widow of Nathey, Ram Awadh, Ram Deo

and Jholai depose about seeing Mool Chand and Brij Lal striking with the gadasa and Ram Naresh and Phool Chand holding the body of the

deceased, while Baldat and Lukki depose about those persons running away. There is nothing to show that these witnesses had any reason to

depose falsely against the accused appellants. I, however, doubt whether the four witnesses who depose to have seen the actual murdering depose

correctly in that respect.

The first information report, which Smt. Dhananti dictated to Jholai, simply stated:

After midnight he (my husband) raised an alarm from the machan that people were assaulting him. Attracted by his alarm Jholai Barai Pardhan,

Ram Deo. Ram Awadh Ahir, Baldat Ahir and Lukki Ahir of my village, many persons of Kudaram and I reached there and saw in the light of the

torch that my pattidars Mool Chand and Phool Chand. and their friend Brij Lal Pasi of Ramgarh Kuber Bai-ka-Pura, and Ram Naresh Ahir of

village Kudaram, at whose place Tudi used to live formerly and who had kept his (Tudi's) mother as his mistress, and one or two other persons

who can be recognised if produced, were running towards the west after having, cut his neck and killed him with gandasa blows. The accused

were chased, but could not be secured.

It is difficult to believe that four persons, including those two who were responsible for this report should have seen the details of the incident with

respect to the actual striking with, the gandasa and the holding of the body and, that those details should not have been mentioned in this report.

24. Further the machan consisted of the deceased's cot fitted to four bamboos at a height of 21/2 cubits, that is, about 1-1/4 yards from; the

ground. There was a thatch over this cot. It really consisted of two thatches, one sloping towards the west and one towards the east. The thatches

were about 3-1/2 feet long, which was the length of the cot, and about 3 feet wide. They extended on each, side about a span beyond the cot and

were about a foot above the eastern and western edges of the cot. I very much doubt that is this set up of the machan these four accused., could

have taken their seat on the cot and that the witnesses who had been running from different directions could have been able to see the actual

persons striking the gandasa and the persons holding the body.

25. Ram Deo, who had run with Ram Awadh, stated that they had started running:, towards the machan silently. Jholai stated, that when he ran

from his field he did not make any noise. I cannot imagine any good reason for this common silence. Ordinarily, persons running to the help of a

victim run raising shouts, and I see no reason why these persons who ran from different directions did not act in the same manner. On their shouts,

it would be expected that the assailants would try to run away as soon as possible.

26. I am, therefore, not inclined to believe the statements of these witnesses that they had seen Mool Chand giving gandasa blows and, had seen

Phool Chand holding the body of the deceased, and may mention here that the learned Sessions Judge acquitted Brij Lal, the other person who

was also said to have given gandasa blows, and Ram Naresh. I am, however, of opinion that the statements of the six witnesses about seeing Mool

Chand and Phool Chand running away deserve to be believed, in the absence of any particular reason for them to depose falsely against them in a

murder case.

27. Two gandasas are said to have been recovered from the house of Mool Chand. One of them has been found to be stained with human blood.

Mool Chand and Phool Chand are cousins. They, however, reside in separate houses. The mere fact of the recovery of gandasas is not sufficient

to lead to the conclusion that Mool Chand must have used a gandasa as deposed to by the witnesses. In fact their recovery may be a reason for

the witnesses" stating that Mool Chand did use a gandasa. It is interesting to note that though witnesses now depose that Mool Chand and Brij Lal

used gandasas, Ram Awadh and Ram Deo in their statements u/s 164, Cr. P. C., deposed that only Mool Chand used the gandasa. Why they

improved on that statement in court is not clear. It cannot be due to the recovery of two gandasas from Mool Chand's house, as the recovery had

been made on the 4th August and their statements u/s 164, Cr. P. C. were recorded on the 14th August.

28. I am further of opinion that the fact of the accused running away from the machan at the time of the incident is sufficient to hold that they were

the murderers of Nathey. The accused gave no explanation for their presence there at the time. They denied the prosecution allegations and just

stated that the case against them was on account of enmity.

29. The murder was clearly pre-planned on account of ill-feeling and was brutal. The deceased was given eleven incised wounds, all on the face

and neck. They included an incised wound 3" x 1/4" x bone deep, oblique extending from the right temple to the right mastoid process across the

middle of the external ear. The cartilage of the right ear had been cut through and through. Another was an incised wound 2 1/2 X 3/4" x bone

deep, oblique on the right lower ramus of the mandible 4" below injury 6. The right lower ramus of the mandible had been cut and fractured. Eight

of the wounds were on the right side of the face. The remaining three wounds were on the front of the neck. Two of them were deep wounds. One

was 8 1/2 x 2 1/2" on the front of the neck above the larynx, extending from the middle of the left side of the neck and going across the front of

"the neck to the right side of the neck back part. The wound went deep, cutting the muscles, nerves and big vessels. The "thyroid" bone and the

body of the 2nd cervical vertebrae had been cut. The oesophagus was also cut at the level of the larynx. The other was 4" x 1/4" x bone deep, on

the front of the neck right side, going deep, cutting muscles, nerves and big vessels. The transverse process and the body of the fifth cervical

vertebrae were also cut.

30. For such a pre-planned and brutal murder, I am of opinion that the persons responsible for it and taking part in it deserve no leniency in

sentence. They plan a brutal murder, they attack a sleeping person and go on hacking him till persons arrive & they had no option but to leave him

and run away. In my opinion, both Moolchand and Phoolchand have been rightly sentenced to death by the learned Sessions Judge.

31. The facts that Phool Chand is about 20 years old and that he is not alleged to have actually used the gandasa do not, in my opinion, justify

awarding him the lesser penalty of law provided for this offence, when the murder was planned and committed as mentioned above. He is equally

guilty not only of the offence u/s 302, I. P. C. on account of Section 34, I. P. C., but he is equally responsible for the planning and carrying out of

the scheme in circumstances which would justify the extreme penalty of law fully. It is not necessary, to my mind, that the assailant who actually

inflicts the fatal blow is liable to be awarded the extreme penalty of law and that his associates must be awarded the lesser penalty of law. Nor do I

consider the number of persons murdered to be any criterion for awarding death sentences among the accused who are proved to have committed

the murder. Punishment is not awarded under the Penal Code on the principle of an eye for an eye and a tooth for a tooth. The punishments

provided in the Penal Code are for the prevention of crime by their proving as deterrent to would be criminals and, if possible, to reform the

criminal by the suffering he has to undergo on account of his acting against the law and violating the rules of society.

32. The courts are not much concerned with the policy or reason behind the law which they have to administer. The policy is for the legislature to

determine. If change of times, change of circumstances, change of moral values and sentiments are supposed to make a law out of date it is for the

legislature to step in and make the law consonant with the prevailing sentiments as to what ought to be a crime and what ought to be the measure of

punishment. I do not, therefore, look at this question of the sentence of death in the light of the views of writers who would like it to be abolished

and in fact who would like the whole system of punishment to go and to be substituted by the system of mental treatment of the supposed criminal.

Any discussion of those views would be futile. The fact remains that the provisions of the Penal Code and the Criminal P. C. in this respect are

what they have been for many a year past. Section 302, Penal Code, provides that a person who has committed murder shall be punished with

death or transportation for life. This certainly gives a discretion to the court to award either of the two sentences, according to the circumstances of

the case, keeping in view the judicial grounds for awarding one or the other of the two sentences. Section 367 (5), Criminal P. C., provides:

If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in

its judgment state the reason why sentence of death was not passed.

In view of these provisions, it has been consistently held by the various Courts, whenever they had to decide this point, that the sentence of death

should be the normal sentence and that there should be extenuating circumstances for justifying the awarding of the lesser sentence. I see no good

reason why these provisions be now interpreted to mean that transportation for life should be the normal sentence u/s 302, I. P. C. and that the

sentence of death should be justified by aggravating circumstances. The words used in section 367 (5), Cr. P. C., are not open to such an

interpretation. Reasons are required for awarding the sentence other than death and not for awarding the sentence of death. I may now refer to

some cases on the point.

33. In -- "Emperor v. Shwe Hla U" 23 Cri LJ 437 the Judges referring to a Full Bench case of their Court observed:

In -- "Crown v. Tha Sin", 1 Low Bur 216 a Full Bench of this Court held that "the extreme sentence is the normal sentence; the mitigated

sentence is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death, but whether there are

reasons for abstaining from doing so." With this view we entirely concur.

34. Exactly this view was taken in--"Naresh Singh v. Emperor". AIR 1935 Oudh 265.

35. In -- AIR 1933 307 (Nagpur) it was observed:

The duty of a Sessions Judge u/s 367 (5), Cr. P. C. is to pass sentence of death in cases of conviction of murder u/s 302, I. P. C. unless there are

reasons for not passing such sentence. A mistaken view seems somewhat prevalent, namely, that sentence of death should not be passed unless

there are aggravating circumstances, but this is a wrong view and the correct view is that sentence of death should be passed unless there are

reasons to the contrary.

36. In -- "In re Ramudu" AIR 1943 Mad 69, it was observed at page 71 :

There is no provision of law that sentence of death shall not be passed on a person of or above sixteen but not more than eighteen years of age. I

had occasion a few days ago to say in a similar case, R. T. No. 82 of 1942 (A11), that to commute a sentence of death in the absence of any

mitigating circumstances purely on the ground of the age of the accused was in effect to lay it down that persons of a certain age should never -be

sentenced to death, even though that was not the law..... The prerogative of mercy in Individual cases lies with the Provincial Government;

and, it is for the Legislature to amend the Children's Act, if an amendment seems required, and to fix the age below which sentence of death shall

not be passed at a higher level. It is not for us to usurp the functions of the Legislature.

Mockett J. observed :

I, however, desire to express my explicit agreement with the observations that he has made on the subject of the sentence in this case. There is no

doubt whatever that the authorities on the subject are abundant that the normal sentence for conviction for murder is that of death.

37. In -- "Gurdev Singh v. Emperor" AIR 1948 Lah 58, four persons convicted of offences under sections 302 and 148, I. P. C., were sentenced

to transportation for life. It was found by the High Court that these assailants had intended to cause the death of the victim. The learned Sessions

Judge in not awarding the death sentence observed:

All the accused in this case are young men of 20 or below..... Having regard to the nature of the injuries and the ages of the accused, I feel

that it will be extremely hard to send all these four accused to the gallows. I think in this case the sentence of transportation for life u/s 302/149,

Penal Code, would meet the ends of justice and I order accordingly.

Munir J. delivering the judgment of the Court, observed at page 61 :

We do not, however, consider it necessary to take additional, evidence in the case as we consider that even if three of the appellants are assumed

to be 20 and one 19 years old, the sentence of death cannot be refused on this ground.

He further observed:

The question whether in a given case the sentence of death or the lesser sentence of transportation for life should be passed is essentially a matter

in the discretion of the convicting Judge, but while exercising this discretion he must bear in mind the position that the usual sentence on a conviction

of murder is death unless there be any extenuating circumstance..... It is only when any well-recognised ground is found to exist that the Judge is

justified in withholding the capital sentence. It is impossible to lay down any general rule defining the classes of cases in which the lesser sentence

may be imposed, though from time to time certain circumstances have been recognized by the Judges who had to consider this question as valid

grounds for imposing such sentence. One of these is the extreme youth of the offender, however brutal or premeditated the offence; but there is no

precedent for the proposition that a youth of 19 or 20 comes within this exception. Another ground for the lesser penalty is to be found in those

cases where an offender who does not come within the first exception is young and acts at the instigation or under the influence of his elders. There

are several cases in which young men of 20 and above have been awarded the lesser penalty because they joined their elders in the murder.

Where the murder is committed in the course of a sudden quarrel and without premeditation or on the impulse of the moment it is usual not to pass

the death sentence unless the circumstances be exceptional, In cases of premeditated murder, however, the usual sentence is death unless the

conduct of the deceased furnishes grave though not sudden provocation for the murder, as for instance, where an aggrieved husband or other mere

relation of a woman murders a man who persists in offending the feelings of the aggrieved relative by publicly carrying an immoral intrigue with the

woman.

There is still another class of cases where the usual sentence may be withheld. These are cases where a man is convicted of murder by reason of

vicarious liability. Where death is intended and the murder is premeditated the offender should usually be sentenced to death irrespective of

whether the vicarious liability arises by reason of Section 34 or Section 149, Penal Code, But where the common object of an unlawful assembly is

the beating of a person and death is not intended but is a likely consequence of the riot, the death sentence is withheld from those who are only

constructively liable, but is imposed on the particular member of the unlawful assembly who brought, about the death. These are some of the well-

recognised cases where the lesser penalty may be awarded on a conviction of murder, but the classification is neither exhaustive nor absolute and

many a case may arise which is not covered either by the rule or by the exception. In such cases the matter rests in the discretion of the convicting

Judge which cannot be fettered by any hard and fast rule.

He further observed at page 62 :

The learned Sessions Judge finds it extremely hard to send all the four men to the gallows and seems expressly to hold that four lives should not be

taken for one. Every sentence in a criminal case, whether it be a sentence of death or transportation or imprisonment, works hardship not only on

the man sentenced but on others, but that has never been a circumstance which enters judicial determination of the sentence. Such cases of

hardship are for the Provincial Government to consider & relieve and not for the judge. In the present case as we have held that the murder was

premeditated and death was intended we would be putting ourselves in an illogical position if we did not pass the usual sentence.

I agree with practically all the observations in this case.

38. In -- Parshadi and Others Vs. Emperor, it was observed

The learned Judge has said

"It is not, I believe, the common practice to sentence to death those who are implicated in a riot in which death is caused and in which the definite

assailants are not ascertained" we do not think that the learned Judge is right in stating the proposition so broadly and possibly he did not mean to.

It is clear that there may be cases "in which the guilt of any particular assailant of actually striking the fatal blow cannot be established but in which

all the persons concerned would be indubitably guilty of murder and equally deserve a capital sentence.

Such a case may clearly be where six men go out with the deliberate intention of killing a person "and in pursuance of the common object one or

other kills him. It may not be possible to establish which struck the fatal blow, but it is manifest that all would be equally guilty and all should

receive a capital sentence. That again is a proposition stated. broadly and in particular cases might require qualification; but it is sufficient to say that

there should not be, if in fact it does exist, a practice to assume that where the particular person cannot be found to be guilty of the fatal blow, the

capital sentence should not be inflicted.

39. In -- "Rajagopalan v. Emperor" 1944-6 F C R 1G.9, two persons were convicted for rioting and murder, the prosecution case being that a

large body of persons had attacked the stair of a salt factory and that when an Assistant Inspector appeared on the scene with a rifle about twenty

of those persons, who had left the compound of the factory, returned to the compound and seven or eight, of them, including the appellants, set

upon him with their weapons and caused serious injuries to him as a result of which he died. It was contended that the appellants could be held

guilty of murder only by virtue of the provisions of Section 149, I. P. C., and that in a case like that a sentence of transportation for life was more

appropriate than the sentence of death. On behalf of the Crown, it was urged that the case of the appellants fell within the purview of Section 34, I.

P. C.

Zafrulla Khan J. delivering the judgment of Spens C. J. and himself, observed at page 172:

In the view that we take, it is unnecessary to decide whether Section 34 would or would not apply to the facts as found by the High Court. We

"are unable to accede to the contention that in case of a conviction under Section 302, Penal Code read with Section 140, the appropriate

sentence in all cases must be transportation for life. The question of sentence must in each case depend upon the facts of the case. Had there been

a finding that the appellants, though they were among the rioters, some of whom in pursuance of the common object of the unlawful assembly as at

that stage constituted, caused the death of the Assistant Inspector, had themselves taken no part in the assault upon the deceased, there might have

been some force in the suggestion that the lesser sentence would meet the ends of justice in their case;

There is no such finding in this case. On the contrary, the finding is that the appellants were among the seven or eight persons who inflicted the

large number of injuries which the deceased received, though the High Court, did not go so far as to accept that part of the evidence which

indicated the nature of the injuries that the appellants had actually inflicted. Having regard to all the circumstances of the case as disclosed in the

evidence, we are not disposed to hold in the case of either of the appellants that the sentence of death is inappropriate.

40. Varadachariar J, felt some difficulty in sustaining the sentence of death imposed on one of the appellants. He did not, however, lay down any

different considerations for the awarding of the death sentence. His difficulty was really his interpreting "the judgment of the High Court to mean

that if the Judges had been of the view that the appellants were guilty on account of the application of Section 149, I.P.C., they would have been

disposed to sentence them to transportation for life and therefore, he felt that the decision on the point whether they were guilty of murder with the

help of Section 34 or with the help of Section 149, I. P. C., ought to have been determined and that without a finding on that point the death

sentence should not have been confirmed.

41. The aforesaid cases support what I have said above that the provisions of the Penal Code and the Code of Criminal Procedure have been

consistently interpreted by the various courts to mean that whenever a person is convicted of committing murder, the Court is to pass the sentence

of death unless there be extenuating circumstances and that the court is not to withhold the passing of the death sentence on the ground that there

were not aggravating circumstances to justify the death penalty. The fact that an accused was twenty years of age was not taken to be a sufficient

reason for not awarding him the extreme penalty of law. The fact that any of the accused was not the actual person to inflict the fatal blow, was

not always a good reason for not awarding the death penalty, though it could be a good reason in certain circumstances depending on the nature of

the incident.

There is a definite expression of opinion in various cases that for premeditated murders the death penalty is the only appropriate penalty for

persons who actually commit the murder or who just help the actual murderer in carrying out the common intention to kill the other person. I am,

therefore, of opinion that persons responsible for premeditated well-planned and brutal murders deserve the death penalty, irrespective of the fact

whether they actually gave the fatal blow, or whether they did give any blow to the deceased, or whether they were just present along with the

other persons to whom the task of inflicting injuries was assigned.

42. I am, therefore, of opinion that both the appellants were rightly convicted and sentenced to death by the learned Sessions Judge. However, in

view of the opinion of my brother that the sentence of death passed on Phool Chand be commuted to transportation for life, I agree with the order

proposed by him to the effect that the appeal of Phool Chand be dismissed and that the sentence passed against Phool Chand be substituted by a

sentence of transportation for life.

43. BY THE COURT: We dismiss the appeal of Mool Chand. We dismiss the appeal of Phool Chand against his conviction u/s 302, I. P. C.,

with the modification that instead of the sentence of death we substitute a sentence of transportation for life. We accept the reference for the

confirmation of the death sentence against Mool Chand direct that the sentence of death against Mool Chand be carried out according to law. We

reject the reference with respect to the confirmation of the death sentence of Phool Chand.