(1952) 09 AHC CK 0007

Allahabad High Court

Case No: Criminal Appeal No. 154 of 1952

Mool Chand and Another		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Sept. 9, 1952

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 367, 367(5)
- Penal Code, 1860 (IPC) - 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 1 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 tae 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 arid 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 gandasa 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 gandasa 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 lace and neck. They included an incised wound 3" x1 /4" xbone deep, oblique extending from the right temple to the right mastoid process across the middle of the external ear. The cartilege of the right ear had been cut through and through. Another was an incised wound 21/2 X 3/4" xbone 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 there wounds were on the front of the neck. Two of them were deep wounds. One was 81/2x2"x21/2" 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" x1/4" xbone 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 riot 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. T 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 septence 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 Tinder Section 302, Penal Code road 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 farts 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 they 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 fell-that the decision on tine point whether they were guilty of murder with the help of Section 34 or with the help of Section 149, 1. 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 tot 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. 1 am, therefore, of opinion that persons responsible for premeditated well-planned and brutal murders deserve the death penally, 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 ap peal 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.