
(1873) 04 CAL CK 0003

Calcutta High Court

Case No: Criminal Appeal No. 979 of 1873

Queen

APPELLANT

Vs

Sabed Ali and Others

RESPONDENT

Date of Decision: April 21, 1873

Judgement

Ainslie, J.

In this case there was a dispute about a piece of land between Fuckeer Ali and Sabed Ali, which ended in a riot, in the course of which a man named Tareboolah, one of the party of the prisoners, fired a gun and killed Somed Ali. It has been found by the Judge that Tareboolah was a member of an unlawful assembly, of which the prisoners whose appeal is now before the Court were also members; and as to Sabed Ali it is also shown by the evidence that he directly invoked the aid of the party among whom was this Tareboolah armed with a gun Tareboolah himself is not under trial; but the Judge, in order to apply the provisions of s. 149 of the Penal Code to the other prisoners, has considered the nature of the offence committed by Tareboolah and has found that it was murder, and in that finding I think he was clearly right. Under s. 149 he has convicted the present appellants of that same offence, and sentenced them to transportation for life. If they are rightly convicted under that section, the Court can pass no milder sentence; if that punishment is too severe, it can be reduced by the Local Government; but the only question just now before us is whether the conviction and sentence are according to law. S. 149 runs as follows:--(reads). The last words are very stringent; if the section applies, the Court is bound to convict of the particular offence. Tareboolah committed the offence of murder; he was at the time of the murder a member of an unlawful assembly; the accused were also members of that unlawful assembly, at the time when the murder was committed; then the questions are, firstly, was the murder committed in prosecution of the common object of the assembly? and, secondly, did the accused know that such an offence was likely to be committed?

2. As to the first I find it impossible to say that the murder which occurred was not committed in prosecution of the common object. It seems to me that the common object

was not merely to eject the party of Fuckeer Ali from the disputed field, but that it was to do so by show of force, and, if necessary, by actual force. I do not think it possible on the evidence to say that the common object was limited to the ejectment, and that the use of force was not deliberately contemplated; nor do I think that we may say that force was only a means to an end, and that the ultimate object of obtaining possession of the field was the only common object of the party; it was clearly the deliberate intention of the unlawful assembly to use certain means to obtain a certain end, and I am therefore unable to come to any other conclusion than that the common object was compounded both of the use of the means and the attainment of the end. The evidence distinctly establishes that a number of men proceeded to the spot to eject Fuckeer Ali; that they or several of them were armed with latis, and that one who was found among the party when the riot commenced, though we do not know when he joined it, was armed with a gun; and that, on resistance being offered, they proceeded to use violence; and judging of their intentions from their actions, I cannot help finding that it was from the first their intention to overpower by force any resistance to the occupation of the field. This violence actually extended to the causing of the death of Samed Ali under circumstances which undoubtedly made the homicide murder on the part of Tareboolah: on this point I believe we are all agreed.

3. I then come to my second question, was this murder an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of their common object, such common object being the use of force, if necessary, to obtain possession of the land? I take it that, when the law speaks of a man knowing the probable result of his acts, it meant that an ordinary man bringing his reason to bear on the matter must know that such result will probably ensue from his act. If A intentionally and without lawful excuse fires a bullet into B's body, he, if not of unsound mind, must know that death is the probable result, though he does not know that death will actually result. B may recover, but, if he does not recover, the causing of death is the intentional act of A. It is no excuse for A to say that he had not brought his mind to bear on the consequences of his act; that he had not thought of the matter, and therefore did not know at the time of committing the act what the probable result would be. If the act done is such that a reasonable man who chooses to consider it must know the probable result, the law will presume the exercise of reason and the consequent knowledge.

4. A number of men armed with clubs go out to enforce a right or supposed right by the use of those clubs; resistance is offered and it becomes a question whether they, instead of overpowering their adversaries, are not overpowered themselves, is it likely that under such circumstances they will measure their blows? Yet clearly they have no right of private defence, and, if they cause hurt in any degree, they must take the consequences. It cannot be said that a man who attacks another with a weapon calculated to inflict serious injury, though without intention of taking life, and finds unexpected resistance, is justified by that resistance in taking life. It may not have been his intention at first to do so, but it comes to be his intention, or at any rate he, under the pressure of the position into

which he has forced himself, comes to commit an act so imminently dangerous that it must in all probability cause such bodily injury as is likely to cause death, without any excuse for incurring the risk of causing such injury, and by that act he commits murder. As it is with the individual, so also is it with the members of an unlawful assembly collected with the common object of gaining a certain end by violence, if it cannot be obtained otherwise. They are bound to assume that the persons they are about to attack will exercise their right of private defence; and, as it seems to me, they must therefore contemplate the probability of the use of very considerable force, and cannot with any shade of reason say that the hurt likely to be inflicted is likely to be limited at any precise degree. They possibly do not wish to cause the death of any man, and would be well content to gain their end without striking a blow, by the mere show of force, but for all that, it is their intention to strike, if their end cannot be otherwise gained; and if a very great amount of violence becomes necessary, and is used, either to overcome the resistance of the opposite party, or to extricate themselves from the position in which they have placed themselves (their opponents being still within the limits of their rights of self-defence), I, for one, cannot but say that the use of that amount of violence, and nothing less, was within their intention; and that being so, I am forced to say that any probable result of that violence was within their knowledge. Homicide is certainly a probable result; and it can hardly be that such homicide under the circumstances can be anything less as regards the individuals whose act directly causes death than murder; and it therefore follows that the probability of the commission of the offence of murder was within their knowledge.

5. In this particular case we have one of the party to which the accused belonged, armed with a loaded gun, a weapon that could not be used as a weapon of offence without imminent risk to life, and, therefore, I look upon this case as one in which the probability of the commission of the offence of murder was more than usually great, and more certainly within the knowledge of the parties. It may be that the accused could have shown circumstances from which the Court ought to infer that the use of that gun was not within their intention or knowledge, but I do not think that the prosecution was bound to prove that no such circumstances existed.

6. Finding that the murder was committed in the prosecution of the common object of the unlawful assembly, and that it was an offence which the accused knew to be likely to be committed in the prosecution of that object, I am compelled by the words of s. 149 to hold that the accused as members of the unlawful assembly are guilty of murder. I would, therefore, on this appeal uphold the conviction and sentence, leaving the question of mitigation of punishment to be dealt with separately.

Pontifex, J.

7. In this case the Sessions Judge has found that the act which caused the murder was sudden, and was unpremeditated by any member of the unlawful assembly. The evidence fully supports such finding. Under these circumstances I am of opinion that

those members of the illegal assembly who did not commit the homicidal act cannot be considered guilty of murder under s. 149 of the Penal Code.

8. To apply that section to the case of murder, its alternative provisions must be read as follows:--"If murder is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or if murder is committed by any member of an unlawful assembly, and the members of that assembly know murder to be likely to be committed in prosecution of that object; every person who, at the time of the committing of the murder, is a member of the same assembly, is guilty of murder."

9. In the present case the common object of the illegal assembly was to obtain possession of land by a large armed force from a small unarmed party. In my opinion the evidence shows that the parties prosecuting that common object did not contemplate, or know it to be likely, that the offence of culpable homicide would be committed. The murder committed hastily by one member of the assembly was not, in my opinion, committed "in prosecution" of the common object of the assembly, in the planning of which no homicidal intention had been entertained. Nor could the members of the assembly think, and much less "know" murder to be likely to be committed "in prosecution" of a common object, which was intended to be, and which might naturally and probably have been, accomplished without homicide.

10. To bring the offence of murder, as defined by the Code, within s. 149, I think it must either necessarily flow from the prosecution of the common object, or it must so probably flow from the prosecution of the common object that each member might antecedently expect it to happen. The offence of murder, as strictly defined by the Code, requires a previous intention or knowledge in the perpetrator; and to "know" that murder is likely to be committed is to know that some member of the assembly has such previous intention or knowledge. The word "know" used in the second branch of the section is, I think, advisedly used, and cannot be made to bear the sense of "might have known." This interpretation of s. 149, so far as murder is concerned, seems to me confirmed by comparing Ss. 398 and 396 with ss. 148 and 149. From s. 398, it appears that, being armed with a deadly weapon at a dacoity, is considered an offence deserving of far greater punishment than the offence under s. 148 of being armed with a deadly weapon at a riot. The reason for this distinction must be that more serious consequences are likely, and must be known to be likely, to result from an armed assembly at a dacoity than at a riot, and yet, if murder is committed by one of five dacoits, the others are not guilty of murder, and may be sentenced to imprisonment for any time under ten years, while, if s. 149 is to be construed, as it has been construed by the Sessions Judge in this case, if murder is committed by one of five rioters, the others would all be guilty of murder, and must be sentenced to death or transportation for life, though less serious consequences would antecedently be likely to result than from a dacoity.

11. I am therefore of opinion that the prisoners who have appealed are not guilty of murder; but as it appears from the evidence that they were members of an illegal

assembly, and were all armed with latis, they are guilty of an offence under s. 148, and ought, in my opinion, to be sentenced to three years" rigorous imprisonment.

Phear, J.

12. It appears to me that the reasoning by which the Judge on the facts thus stated by him brings the charge home to the prisoners is some what incomplete. The words of s. 149, Indian Penal Code, are as follows:--(reads).

These words do not, in my opinion, support the view which the Judge expressed at the outset of his judgment, and by which he appears to have been guided to his final decision to the effect that, because murder was committed by one member of the assembly, therefore all the prisoners as taking part in the riot and having the same object in view, namely, to drive Fuckeer Buksh off the land, were in the eye of the law guilty of murder. It seems to me clearly not the case that every offence which may be committed by one member of an unlawful assembly while the assembly is existing, i.e., while the members are engaged in the prosecution of a common object, is attributed by s. 149 to every other member. The section describes the offence which is to be so attributed, under two alternative forms, namely, it must be either, 1st,--"an offence committed by a member of the unlawful assembly in prosecution of the common object of that assembly," or 2nd,--"an offence such as the members of that assembly knew to be likely to be committed in prosecution of that object."

13. Now, inasmuch as the continuance of the unlawful assembly is by the definition of s. 141 made conterminous with the prosecution of the common object, it seems tolerably clear that the Legislature must have employed the words "prosecution of the common object" with some difference of meaning in these two passages respectively. Also the mere fact that the Legislature thought fit to express the second alternative appears to show very distinctly that it did not intend the words "in prosecution" which are found in the first to be equivalent to "during the prosecution," for, if they were, then the second alternative would have clearly been unnecessary. And a comparison with this passage of the language which is used in s. 460, where the Legislature makes all the persons concerned in committing a burglary punishable with transportation for life, if any one of their number at the time of the committing of burglary causes death, &c., strongly bears out this view. I am of opinion that an offence, in order to fall within the first of the above alternatives, i.e., in order to be committed in the prosecution of the common object, must be immediately connected with that common object by virtue of the nature of the object; for instance, if a body of armed men go out to fight, their common object is to cause bodily injury to their opponents; and in that case death, resulting from injury caused, would be homicide committed in prosecution of the common object. And an offence will fall within the second alternative, if the members of the assembly, for any reason, knew beforehand that it was likely to be committed in the prosecution of the common object, though not knit thereto by the nature of the object itself.

14. It seems, thus, on a little consideration, to be apparent that the two alternatives of s. 149 do not cover all possible cases of an offence being committed by one member of an unlawful assembly during the time when the common object of the assembly is being prosecuted. It follows that, in every trial of prisoners on a charge framed under the provisions of s. 149 of the Penal Code, even when it is proved that the specified offence was committed by one of the members of the assembly during so to speak the pendency of that assembly, it yet remains an issue of fact to be determined on the evidence, whether that offence was committed in prosecution of the common object as I have endeavored to explain the meaning of those words in the first part of the section, and if not whether it was an offence such as the members of the assembly knew to be likely to be committed in the prosecution of the object.

15. Returning now to the particular facts of the present case, I think there appears to be abundant reason for coming to the conclusion that Tareboolah committed murder in the way described by the Judge. But it seems also clear that murder, or even the taking of life, was not immediately connected with the common object of the unlawful assembly of which the prisoners were members. That common object was, as the Judge expresses it, to drive Fuckeer Buksh off the land and to prevent him from cultivating it. There is however nothing in the evidence to indicate that the members of the assembly were prepared and intended to accomplish that object at all hazards of life. I do not think that they intended to attain the common object by means, if necessary, of murder. Indeed, the Judge himself says that "the resistance offered by Samed Ali and Sharef Ali was unexpected" by the prisoner's party, and that it "led to the sudden, and probably at first unintended, use of the gun by Tareboolah." This being so, I find myself unable, sitting as a Judge of fact, on this appeal, to arrive at the conclusion that Tareboolah committed murder in prosecution of the common object of the unlawful assembly, within the meaning of the first part of the section.

16. Neither do I think it is satisfactorily made out by the evidence that the prisoners knew it to be likely that this offence of murder would be committed in the prosecution of the common object of the assembly within the meaning of the second part of the section, taking that object to be the driving Fuckeer Buksh off the land. It was a priori possible, and indeed most probable that that object would be effected without any risk of life whatever. The assailants had reason to suppose, indeed knew quite well, that the party they were about to attack was absolutely unarmed. The members of the unlawful assembly generally, including the prisoners, might reasonably have expected (and there is nothing whatever in the event to show that they did not) that Fuckeer Buksh and his co-laborers would be driven off the land by the mere show of such force as they had, or at any rate by the use of force very far short of life-taking. And even if I allowed myself to be carried by the evidence so far as to think (as I do not) that the prisoners and the other members of the unlawful assembly knew that culpable homicide was likely to be committed in the prosecution of the common object, still I should be unable to say that their knowledge also included any of the ingredients of aggravation which are required in

order to convert the offence of culpable homicide into the offence of murder. It is obvious that, in the events which happened, those ingredients were of sudden origin, and were entirely personal to the actual murderer. Tareboolah committed murder by doing, on the spur of the moment, a previously unintended act, which act however he must himself be taken to have known at the time was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death, and which did in fact cause death. If then the prisoners knew that murder was likely to be committed in the shape in which it was committed, they must have been aware that it was likely one of the members of the unlawful assembly would do an act which would be likely to cause death, and which would in fact cause death, a statement which on the face of it seems to be a contradiction of terms. In truth, when the second likelihood comes to be placed upon the first, it has the effect in my judgment of removing the case altogether from the scope of s. 149. And none of those forms of murder from which "likelihood" is absent are brought by the evidence in this case within the contemplation of the prisoners or of anybody else. There is nothing to suggest that the prisoners (or indeed any of them) knew that it was likely that an act would be done by one of the members of the assembly with any of the intents mentioned in the first three clauses of s. 300 of the Penal Code and would cause death.

17. On the whole I think that the prisoners have been wrongly convicted of the charge framed under s. 149. I think however that the facts established against them certainly amount to rioting; and it appears also that they were all armed with heavy latis. Therefore, under the provisions of s. 148, they are punishable with imprisonment for a term which may extend to three years. Accordingly I would reduce the sentence passed by the Sessions Judge to a sentence of rigorous imprisonment for three years.

Jackson, J.

18. It appears to me that the construction of this section (149), that is, a construction which shall be at once reasonable and grammatical, involves two difficulties, or at least two points which call for attentive consideration:--

1st.--The common object.

2nd.--Or such as the members of that assembly knew to be likely to be committed in the prosecution of that object.

19. It has been proposed to interpret the "common object" in a precise sense, so as to indicate the exact extent of violence to which the rioters intended to go, namely, to take possession of the land by force, extending, if need be, to wounding and the like. This, I think, is not the sense in which the words were intended to be understood. They are not, it seems to me, used in the same sense as "the common intention" in s. 34, which means the intention of all, whatever it may have been. The words here seem to have manifest reference to the defining section (141), and to point to one of the five objects, which being

common to five or more persons assembled together, make their assembly unlawful. For this reason I think that any attempt to mitigate the rigor of the section by limiting the construction of the words "common object" must fail, and that any offence done by a member of an unlawful assembly in prosecution of the particular one or more of the five objects mentioned in s. 141, which is or are brought home to the unlawful assembly, to which the prisoner belonged, is an offence within the meaning of the first part of the section.

20. We then come to the second point, i.e., the meaning to be given to the words "or such as the members," &c. If the word "or" has been used in an alternative sense, the sentence would, if fully expressed, run thus:--"If an offence is committed, which is committed in prosecution, or which, if not so committed, is yet such as the members knew to be likely," which seems absurd. Nor can it be believed that the Legislature intended to attach the consequences of (say) murder committed by a member of an unlawful assembly in prosecution, &c, to all members of that assembly, unless those members had a knowledge that the commission of murder was likely, as an incident of their endeavors to carry out the "common object." For this would be the consequence, if the word "or" be a simple alternative, and if the first condition being fulfilled, namely, that the act was committed in prosecution of the common object, it was unnecessary to resort to the second, in which case the finding would simply be that an offence, namely, murder, had been committed by a member of the unlawful assembly in prosecution of the common object thereof, although the person who actually committed the murder had used means not within the contemplation of the others, such as the firing of a concealed pistol, or the like, and all the other members of that assembly would thereupon be liable to be hanged or transported for life at the discretion of the Judge,--a thing which seems impossible to have been within the intention of the Legislature. But if the word "or" be treated, with some violence I admit, as illustrative, or instead of "and," and the knowledge of likelihood be thus a further condition imposed, the law becomes at once reasonable and intelligible.

21. In view of the difficulties caused by the section, I was at first strongly inclined to believe that the word "or" had crept in by a misprint, or clerical error, either instead of "and," or simply as an addition to the text, and I applied for information to the legislative department. My learned friend, Mr. Whitley Stokes, however, assures me that the word appears in all the copies of the Code as successively considered and amended as far back as 1856 when the section, as it now stands, took the place of the original section, numbered 133, which may be seen at page 32 of the edition printed in England in 1851, and which was of a different character.

22. In the difficulty which besets us, the construction which I have suggested is the only one which seems to me possible, and I could not consent upon s. 149 to subject any person to the consequences of an offence which, though committed in prosecution of the common object of the unlawful assembly, he himself had not directly contemplated, unless it was proved that he knew it to be likely that such offence would be so committed.

23. In the particular case before us, I concur in the view of the facts taken, and in the order to be made by the majority of the Court

Couch, C.J.

24. The appellants in this case have been convicted under s. 149 of the Penal Code. A comparison of this section with s. 460 shows, as has been noticed by Phear, J., that s. 148 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object. The difference of the language of the two sections seems to show that the legislative authority had in its mind the distinction between the two cases; and it is not sufficient in order that a person may be convicted under s. 149 that there should be an unlawful assembly, that the members of it should be prosecuting the common object of it, and that an offence should be committed by one of them.

25. I need not repeat the language of the section. It is divided, as it seems to me, into two parts, and in my opinion, in order to bring a case within the first part, namely, that which speaks of the offence being committed in the prosecution of the common object of the assembly, the act must be one which upon the evidence appears to have been done with a view to accomplish the common object. I think this is the meaning of that part of the section, and we must see whether the act was done with that view.

26. The Sessions Judge has found, and I think correctly, that the common object in this case was to drive Fuckeer Buksh off the land, and he has stated, I also think in accordance with the evidence, what occurred. "I do not doubt," he says, that the unexpected resistance offered by Somed Ali and Sharef Ali, but more especially of the former who was a young and powerful fellow, and who snatched a latti from the hands of one of his adversaries, and laid about vigorously with it, led to the sudden, and probably at first unintended, use of the gun by Tareboolah. Finding his party driven back by the two men Somed Ali and Sharef Ali, for the two old men Fuckeer Buksh and Kadez Ali were not of much account (though Fuckeer Buksh's right hand shows that it was considerably knocked about), Torab Ali raised his gun and fired striking the advancing Somed Ali full in the chest." That does not appear to me to be an act done by Tareboolah with a view to accomplish the object of driving the other party off the land in consequence of the unexpected counter-attack of that party, and with a view to prevent or repel it. I think that is the fair conclusion from the evidence, and certainly in a case of this description where, if the accused are found guilty, they are liable to a sentence of death, if there is a reasonable doubt as to the view with which the gun was fired, they ought to have the benefit of it. I am unable to say upon the evidence in this case that the firing the gun was done in the prosecution of the common object of the assembly.

27. Then I have to consider the second part of the section that the offence is to be such as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. At first there does not seem to be much distinction

between the two parts of the section, and I think the cases which would be within the first offences committed in prosecution of the common object, would be generally, if not always, within the second, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. But I think there may be cases which would come within the second part, and not within the first. Without laying down the law as to any other case than that before us, I think there might be a case of this kind; persons assemble with a view to attack and plunder the house of a particular person; that would be an unlawful assembly, and the common object of the assembly would be house-breaking, or the other offences which would be included in such acts as attacking and plundering a man's house; but from some cause, such as a show of resistance, they might not continue to prosecute that common object, and before they had dispersed, and whilst they continued to be an unlawful assembly, some of them might plunder another house and thereby commit an offence. Such a case might come within the second part of the section, as an offence which the members of the unlawful assembly knew to be likely to be committed in prosecution of the common object, but which was not committed in the prosecution of it. But that is a case which we should have to determine when it arises. I only mention it as showing that there may be cases which would come within the second, but not within the first part of the section.

28. The question in this case is whether upon the evidence we can say that these persons when they met together, with the object of driving Fuckeer Buksh and his party off the land, supposing they knew that Tareboolah had a gun with him, knew also that he was likely to make use of it in such a manner as to be guilty of the offence of murder. Seeing what is necessary to constitute that offence, I am unable upon this evidence to come to the conclusion that these persons knew that this was likely. I think it is not only possible, but probable, that they did not think that the gun would be used in that manner by Tareboolah. And it seems to me upon the finding of the Sessions Judge that it was so, because he appears to have thought that the use of the gun was sudden and probably unintended. He seems to have thought that, if nothing more had occurred than driving the party off the land, and what might naturally be expected to happen in doing that, the gun would not have been used in such a manner as to make the person using it guilty of murder, and as I said in regard to the first part of the question, we are bound where there is a reasonable doubt to give the accused the benefit of it. I concur with the other members of the Court in thinking that the accused ought not to have been convicted under s. 149, but that they may properly be convicted under s. 148. The conviction will be altered accordingly, and the sentence will be one of three years" rigorous imprisonment.