

Official Liquidator, The Universal Transport Co., Ltd. (in liquidation) *v.* S. Jagjit Singh and others  
 Falshaw, J.

case of a person who subscribes to the Memorandum of Association of a Company, no separate application for shares is necessary, yet an express allotment of shares to the subscriber is necessary in order to give rise to liability to pay up the value of the shares, and where there has been no valid allotment of shares to the subscriber liability to pay up the value of the shares does not arise. This certainly appears to support the case of the respondent, but with due respect I find this pronouncement of law of somewhat dubious value since the learned Judge has observed that he nowhere found any authority for the view that no express allotment of shares was necessary in order to give rise to the liability to pay up the value of the shares. Quite evidently the English cases cited by the Liquidator in this case were not cited before him and they are clear authorities on the point that no allotment of the shares is necessary to create liability on the part of a person who has subscribed to the Memorandum of Association.

I accordingly dismiss the objections of Sampuran Singh with costs and order that his name be included in the list of contributories of the Company for 50 shares.

#### CRIMINAL APPELLATE SIDE.

*Before Bhandari, C. J., and Falshaw, J.*

ATMA SINGH—*Convict-Appellant.*

*versus*

THE STATE—*Respondent.*

Criminal Appeal No. 77 of 1955

1955  
 April, 6th

*Penal Code (Act XLV of 1860)—Sections 300 Exception 4, and 302—Exceptions—Accused claiming benefit—Duty of accused to establish facts supporting his case—Term “fight” in Exception 4—Definition of—Murder—Sudden quarrel—Death caused by spear blows—Sentence*

*Held*, that it is the duty of an accused who is claiming the benefit of the exceptions to make some attempt to establish the facts which would support his case.

*Held* further, that term "fight" in Exception 4 to Section 300 is not defined in the Penal Code. It takes two to make a fight. In order to constitute a fight it is necessary that blows should be exchanged even if they do not all find their target.

*Held* also, that the murder being not premeditated and having resulted in the heat of the moment in the course of a sudden quarrel, the sentence of transportation for life was sufficient and the extreme penalty of death was not called for.

*Appeal from the order of Shri Guru Datt Sikka, Sessions Judge, Gurdaspur, dated the 31st January, 1955, convicting the appellant.*

J. G. SETHI, for Appellant.

K. S. CHAWLA, Assistant Advocate-General, for Respondent.

#### JUDGMENT

FALSHAW, J. Atma Singh appellant was tried by the Sessions Judge at Gurdaspur along with his father Kahan Singh and younger brothers Kartar Singh and Hazara Singh on a charge under section 302 read with 34, Indian Penal Code. In the event his father and brothers were acquitted and he alone has been convicted under section 302, Indian Penal Code, and sentenced to death. We have before us his appeal and his case for confirmation of the sentence. Falshaw, J.

Although the whole of the prosecution story was denied by all the accused, who simply alleged that they had been implicated on account of enmity and put forward no kind of alternative explanation of the circumstances under which Shangara Singh deceased was killed, it is not now

Atma Singh  
 v.  
 The State  
 ———  
 Falshaw, J.

seriously contested that this event took place more or less in the circumstances alleged by the prosecution. It seems that Kahan Singh accused and Bhagat Singh, the father of Shangara Singh deceased, who are Jats of Vero Nangal, had some dispute about the irrigation of their lands. There are two outlets in the village, the eastern and western outlets, and formerly the lands of Kahan Singh had been watered from both these outlets but consolidation of holdings in the village had taken place and consequently the lands held by different owners were somewhat different from their previous holdings and now a dispute had arisen regarding whether Kahan Singh was now entitled to any water at all from the eastern outlet.

In order to settle this matter a so-called *pan-chayat* had been convened between 8 and 9 p.m. on the 25th April 1954 at a place near the house of both the accused and the deceased, and the persons who attended were apparently the cultivators of the village who were interested in the eastern outlet and included Bhagat Singh P.W. 4, Kundan Singh P.W. 1., Diwan Singh P.W. 5, Ishar Singh P.W. 6, Pritam Singh P.W. 7 and Pal Singh P.W. 8, as well as Kahan Singh and his eldest son Atma Singh accused, who are alleged to have kept in their possession a stick and a spear respectively while the meeting was going on. According to the evidence of the prosecution witnesses the discussion developed into an exchange of abuse between Bhagat Singh P.W. on the one side and Kahan Singh and Atma Singh on the other. At the sound of this exchange of abuse it is alleged that on the one side Kahan Singh's other two sons ran out of their house armed with sticks and on the other side Shangara Singh deceased came out of his father's house, and on

Shangara Singh's arrival all the accused set on him, Atma Singh spearing him on the left side of the chest while each of the others gave him a blow with his stick. Pal Singh P.W. 8 is said to have tried to intervene and the stick blow was aimed at him by Kartar Singh accused but it missed him and the accused then ran away.

Atma Singh  
*v.*  
The State  
\_\_\_\_\_  
Falshaw, J.

After the occurrence Shangara Singh was taken into his house and Kundan Singh went to a neighbouring village Rangar Nangal and brought Dr. Om Parkash, P.W. 3, to attend to Shangara Singh. The doctor gave him an injection and advised his immediate removal to the hospital, but actually no attempt was made to take him to the hospital until early following morning and he is said to have died on the way. In the meantime Kundan Singh P.W. went to the Police Station at Batala, 7 miles away, where his report was recorded at 5-30 a.m.

The medical evidence leaves no doubt that Shangara Singh died as the result of a spear injury on the chest under which the weapon had penetrated to a depth of  $4\frac{1}{2}$  inches injuring on its way the left lung, the diaphragm and the stomach. He also had three bruises on the back, apparently the result of stick blows.

The Police reached the spot at about 10 a.m. on the morning of the 26th of April, there being little recovery of sticks from the three accused who were acquitted and a spear from Atma Singh. Only the spear was sent for examination and it was found to be stained with human blood. in the way of investigation beyond the alleged

As I have said the accused simply denied the whole prosecution story and neither put forward any alternative theory nor produced any defence evidence.

Atma Singh  
v.  
The State  
Falshaw, J.

The learned counsel for the appellant has not suggested that we should disbelieve the prosecution story to the effect that it was Atma Singh appellant who inflicted the fatal spear injury on Shangara Singh deceased. He has, however, tried to make out that the case fell not under section 302 but under section 304, Indian Penal Code, by reason of the applicability of the Fourth Exception in section 300, Indian Penal Code, according to which culpable homicide does not amount to murder if it is committed in the heat of the moment and without premeditation and in the course of a sudden fight following upon a sudden quarrel. Although it was not even suggested in the cross-examination of a single prosecution witness that when Shangara Singh came out of his father's house he was armed with a weapon of any kind, or that with any such weapon he attacked or tried to attack Atma Singh or any of the other accused, it is now suggested that this is in fact what probably happened, and it is argued that if in fact Shangara Singh was armed with any weapon and looked as if he was about to attack Atma Singh, even if he did not actually aim any blow at him, this would make the occurrence a sudden fight within the meaning of the Exception.

In the first place I am not prepared to accept the suggestion of the learned counsel for the appellant that things must necessarily or even probably have happened in this way. It is the duty of any accused who is claiming the benefit of one of the Exceptions to make some attempt to establish the facts which would support his case and as I have said no prosecution witness was cross-examined on these lines. Moreover apart from Bhagat Singh the witnesses generally appear to be disinterested in the sense that no previous enmity against the

accused is suggested. The only suggestion now raised in this behalf is that they might have had some partiality against the accused as being persons with an interest in the eastern outlet, but I do not attach much importance to this, nor do I consider that the witnesses are to be regarded as interested unless it can be shown that they had some other reason for taking sides with Bhagat Singh against the accused in this matter. I, therefore, do not see any sufficient reason for accepting the suggestion that Shangara Singh came to the spot armed with any weapon and adopted a threatening attitude.

Atma Singh  
v.  
The State  
Falshaw, J.

I would, however, add that even if I had come to the conclusion that Shangara Singh must have come to the spot armed with some weapon for the purpose of protecting his father, if necessary, this would not be sufficient to make the affair a fight within the meaning of the Exception. The term 'fight' is not defined in the Code, but everyone knows what a fight is and that it takes two to make a fight. I would agree with the argument of the learned counsel for the appellant that it is not necessary that weapons should be used in a fight, and also that an affray can be a fight even if only one party in the fight is successful in landing a blow on his opponent. I would, however, hold that in order to constitute a fight it is necessary that blows should be exchanged even if they do not all find their target, and I do not in the present case find any evidence to suggest that Shangara Singh aimed any blow at Atma Singh. I am, therefore, of the opinion that the case is not covered by the Fourth Exception and that it falls under section 302, Indian Penal Code. It is, however, clear that Atma Singh speared Shangara Singh in the heat of the moment and in the course of a sudden quarrel and that the murder was not premeditated, and in the circumstances I do not

Atma Singh consider that the extreme penalty is called for.  
 v. The State I would accordingly accept the appeal to the extent of setting aside the sentence of death and instead sentencing Atma Singh to transportation for life. The sentence of death is, therefore, not confirmed.  
 Falshaw, J.

Bhandari, C. J. Bhandari, C.J. I agree.

CIVIL ORIGINAL SIDE

*Before Falshaw, J.*

RAJESHWAR PARSHAD, EXECUTOR & ADMINISTRATOR, R.B. LALA BENARSI DASS ESTATE, AMBALA CANTONMENT,—*Petitioner.*

*versus*

THE SIMLA BANKING AND INDUSTRIAL CO., LTD. (IN LIQUIDATION), SIMLA, THROUGH ITS OFFICIAL LIQUIDATOR,—*Respondent.*

Civil Original No. 21 of 1954

1955  
 April, 7th

*Companies Act (VII of 1913)—Section 156(1) (vii)—Company—winding up—Sum due to a member on account of unpaid dividends—Position of member, whether that of a creditor—Whether such dividends can be set off against amount due from him as contributory.*

*Held*, that Section 156(1) (vii) of the Companies Act, was not intended to give any relief of any kind to the Contributories. On the contrary its object appears to be to impose further hardship on these persons since its effect is that they are not even permitted to rank as creditors of the Company in respect of any sums due to them on account of dividends and profits and such sums can only be claimed by them if and when all the debts of the Company have been discharged and there remains a surplus available for distribution among the Contributories when the stage contemplated by Section 192 of the Act is reached.