APPELLATE CRIMINAL

Before S. S. Sandhawalia, J. and B. S. Dhillon, J.

BIRBAL ETC.,—*Appellants.*

versus

STATE,—*Respondent.*

Criminal Appeal No. 1006 of 1968.

May 20, 1971.

Code of Criminal Procedure (Act V of 1898)—Section 423—Indian Penal Code (XLV of 1860)—Section 34—Accused charged with a substantive offence read with section 34—Trial Court not applying section 34 but convicting the accused for substantive offence—Appeal by the accused against such conviction—No appeal by the State—Appellate Court—Whether can apply section 34.

Held, that section 34, Indian Penal Code does not constitute a substantive offence and there can be no such thing as an acquittal under this section. Common intention is usually if not invariably an inference from surrounding facts. A finding on the point of the absence or presence of the common intention partakes essentially of the nature of a finding of fact. There is hence no reason why such a finding regarding section 34 should be outside the purview of the appellate Court when all other similar findings of fact are admittedly within its purview. Section 423(1)(b) of the Code of Criminal Procedure, expressly vests the appellate Court with the power of altering a finding in an appeal against conviction. There is thus no manner of doubt that the High Court when seised of an appeal against conviction can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the Sessions Judge and reject the evidence accepted by him. The one fetter which has been placed on the appellate Court's power when hearing an appeal from conviction is that it cannot reverse a finding of acquittal unless there is an appeal against it under section 417, Criminal Procedure Code. This bar is a creature of the statute. It is a technical rule which forbids the recording of a conviction by the appellate Court against an accused person who has been acquitted of a specific offence in an appeal directed against his conviction only. This rule comes into play only when an express finding of acquittal has been recorded on a charge for a substantive offence. As section 34, Indian Penal Code is not a penal provision and does not constitute a substantive offence no acquittal can consequently follow thereunder. Therefore the power of the appellate Court to arrive at a contrary finding regarding the absence of the common intention cannot be equated with the reversal of a finding of acquittal, on a

substantive charge. The bar of the reversal of an acquittal is not even remotely attracted in the context of the application or otherwise of section 34, Indian Penal Code. Hence when an accused is tried for a substantive offence read with section 34 Indian Penal Code, and the trial Court holds section 34 to be not applicable but convicts the accused for the substantive offence, the appellate Court while entertaining an appeal against such conviction under section 423, Code of Criminal Procedure, can apply the provisions of section 34 even if there is no appeal by the State. However it is equal axiomatic that where a finding of the absence of common intention results in an acquittal on a substantive charge, it cannot be reversed by the appellate Court under section 423(1)(*b*).

(Pages 8 to 11)

Case referred by Hon'ble Mr. Justice S. S. Sandhawalia, on December 4, 1969 *to a Division Bench for decision of an important question of law involved in the case. The Division Bench consisting of Hon'ble Mr. Justice S. S. Sandhawalia and Hon'ble Mr. Justice Bhopinder Singh Dhillon, heard the case and after deciding the important question of law on* 20*th May,* 1971, *sent it back to a Single Bench.*

The case is finally decided by the Single Bench on 24*th May,* 1971.

Appeal from the order of Shri Amar Nath Aggarwal, Additional Sessions Judge, Hissar dated the 14*th October,* 1968 *convicting the appellants.*

HARPARSHAD AND M. L. SARPAL, FOR DR. A. S. ANAND, ADVOCATES, for the appellants.

HARI MITTAL, ASSISTANT ADVOCATE-GENERAL HARYANA, for the respondent.

ORDER

S. S. SANDHAWALIA, J.—The question of law formulated for the decision of the Bench is in the following terms: —

> "Is an appellate Court whilst entertaining an appeal against conviction under section 423(1)(b) of the Code of Criminal Procedure entitled to apply the provisions of section 34, Indian Penal Code, where the trial Court has expressly held otherwise (though the accused person was charged with a substantive offence read with section 34, Indian Penal Code) and the State has not moved by way of appeal against such a finding."

It would suffice to advert to the facts relevant to the above-said legal question only. Manphool appellant and his son Birbal appellant were charged under section 302 read with section 34, Indian Penal Code, before the Court of Session at Hissar. The learned Additional Sessions Judge acquitted both of them on the above-said charge but convicted them individually of the minor offence under section 304, Part I, Indian Penal Code, and sentenced each of them to five years rigorous imprisonment and a fine of Rs. 500. The learned trial Court expressly found on facts that section 34, Indian Penal Code, was not attracted in the case.

(2) Ram Sarup deceased along with one Smt. Naraini had tenanted a piece of agricultural land from one Basti Ram of their village. Subsequently, however, they inducted Birbal appellant as a partner in cultivation in order to have the use of his farm animals. It was agreed between the parties that Birbal appellant would transport the agricultural produce of gram and fodder to the house of Ram Sarup deceased after the same had been harvested and it would be divided between them according to the agreed shares. On the 2nd of May, 1968, Ram Sarup dceased, Smt. Naraini and Birbal appellant duly shared the gram crop between them and removed the same to their respective houses. The remaining fodder therefrom, however, continued to lie in the field and was to be divided subsequently. However, on the 3rd of May, 1968, Birbal appellant removed the entire fodder lying in the fields to his house. On the learning of the same, Ram Sarup deceased along with his wife P.W. Sharbati at about evening time went to the house of Birbal appellant and remonstrated with him for removing the entire fodder which, according to him, included the undivided shares of the deceased and Smt. Naraini. Manphool appellant was also present in the house when the protest above-said was made and an altercation between the two appellants on one side and the deceased and his wife on the other, ensued. Bhagwana and Sheo Karan P.Ws. who were passing in the street adjoining the court-yard were attracted by the commotion and in their presence Birbal appellant obviously infuriated delivered a *lathi* blow on the head of Ram Sarup deceased on receipt of which he forthwith fell unconscious to the ground. Thereafter both the appellants inflicted four or five more injuries on the deceased. P.Ws. Sheo Karan and Bhagwana interceded and rescued the deceased from further injury but he succumbed to those already inflicted after about one hour of the occurrence. The case against the appellant was registered soon thereafter on the statement of P.W. Sharbati.

(3) The prosecution case as laid stands accepted almost in its entirety as is apparent from the detailed referring order recorded by me. The issue, however, which has nesessiated the reference to the Division Bench is the nature of the offence committed by Manphool appellant. On behalf of this appellant it was contended that his conviction under section 304, Part I cannot be sustained and reliance for this argument was first placed on the medical testimony, which would hence merit notice in some detail. Dr. Sangwan on the 4th of May, 1968, performed the autopsy on the body of Ram Sarup and had found the following injuries on his person :—

(1) Contused wound $1\frac{1}{2}'' \times \frac{1}{2}''$ deep up to bone on right side of occipital bone region of scalp ;

(2) Contused wound $2'' \times \frac{1}{2}''$ deep up to bone on the left side occipital region of scalp parallel to injury No. 1.

(3) Contusion $4'' \times 2''$ on back of right wrist ;

(4) Contusion $4'' \times 3''$ on front of right shoulder ;

(5) Contusion $4'' \times 2\frac{1}{2}''$ on left iliac region ;

(6) Contusion $5'' \times 3''$ on outer side of left forearm ;

(7) Contusion $6'' \times 2''$ on left side of back.

This witness opined that the death of the deceased was the result of the multiple injuries as a result of shock and haemorrhage and all these injuries were stated to be sufficient to cause death in the ordinary course of nature. The witness also opined that injuries Nos. 1 and 2 on the head of the deceased were collectively sufficient in the ordinary course of nature to cause death.

(4) On the basis of the above-said medical evidence it was plausibly argued that out of the seven injuries on the person of the deceased only two on the head were of a dangerous character which could possibly have resulted in the death whilst the other five were merely contusions on the non-vital parts of the body. Coupled with this is the fact that the prosecution evidence was wholly unspecific regarding the injury inflicted by Manphool appellant. Whilst the first *dang* blow on the head was categorically attributed to Birbal appellant the prosecution evidence thereafter showed that both the appellants

inflicted the rest of the injuries on the body of the deceased without attributing any specific injury to Manphool appellant. There is thus no conclusive evidence that the second injury on the head of the deceased was the result of any blow by this appellant and the finding recorded by the trial Court is also to the same effect and is in these terms :—

> "According to the medical evidence injuries Nos. 1 and 2 were collectively sufficient in the ordinary course of nature to cause death. It is not clear on the record as to who out of the two accused caused the second injury on the head of the deceased."

Relying heavily on the medical testimony and the above-said finding which was not assailed on behalf of the prosecution it was argued that in this context when section 34, Indian Penal Code, has been specifically held to be inapplicable and as any specific head injury has not been attributed to the appellant, he therefore, cannot be convicted of the substantive offence under section 304, Part I, Indian Penal Code.

(5) On a detailed consideration of the facts and the evidence, however, I arrived at positive finding that an inescapable inference arose that the two appellants were actuated by a common intention to cause injuries which they did to the deceased and that the trial Court was in error to come to a contrary finding. Nevertheless it was argued that the two appellants had been specifically charged under section 302 read with section 34, Indian Penal Code, and the trial Court after adverting to this aspect had acquitted them of the charge under section 34, Indian Penal Code. It was contended with vehemence that no appeal had been preferred by the State against the finding of the absence of common intention and consequently against what was termed as an acquittal under section 34, Indian Penal Code. Learned counsel therefore, reiterated his stand that the finding by the trial Court that section 34, Indian Penal Code, was not attracted, was sacrosanct and could not be disturbed in the present appeal and the appellate Court was precluded from applying the provisions of section 34, Indian Penal Code, whilst maintaining the conviction. It is the validity of this contention which is now in issue.

(6) At the very out set I would notice that Mr. Har Parshad, the learned counsel for the appellants, appeared to be half hearted in canvassing the legal proposition in favour of his clients. It was not disputed before us that section 34, Indian Penal Code, is not a penal provision. It is placed in Chapter II of the Indian Penal Code, bearing the heading "General Explanations". It does not create a substantive offence. That section 34, Indian Penal Code, is merely a rule of evidence, is beyond challenge now. In *B. N. Srikantiah and another* v. *State* of *Mysore,* (1), their Lordships have pithily observed as follows :—

> Section 34 is only a rule of evidence and does not create a substantive offence. It means, that if two or more persons intentionally do a thing, jointly it is just the same as if each of them had done individually."

The above view has been reaffirmed in *Jaikrishnadas Manohardas Desai and another* v. *State of Bombay,* (2), in the following terms :—

> "Section 34 does not create an offence; it merely enunciates a principle of joint liability for criminal acts done in furtherance of the common intention of the offenders."

I would notice that the above decision has been brought to our notice very fairly by Mr. Har Parshad himself.

(7) Though the legal question before the Bench is not of an uncommon occurrence and arises frequently in criminal appeals yet there appears to be an acute paucity of authority bearing directly on the point. The case which appears to be on all fours is a single Bench decision in *Umrao Singh and others,* v. *State of M. P.* (3). In that case three persons were jointly tried on charges under section 325 and 352 read with section 34, Indian Penal Code. The Court below held that section 34, Indian Penal Code, was not applicable and two of the petitioners were convicted under section 323, Indian Penal Code, whilst the third was convicted under section 352, Indian Penal Code. In revision proceedings before the High Court an identical objection was taken that as the petitioners had been acquitted of constructive liability under section 34, Indian Penal Code,

(1) A.I.R. 1958 S.C. 672.
(2) A.I.R. 1960 S.C. 889.
(3) A.I.R. 1961 M.P. 45.

and there was an absence of proof regarding the individual blows attributed to each. Therefore, the High Court could not apply the provision of section 34, Indian Penal Code. Repelling the contention Shiv Dayal J. has observed as follows :—

> "An appellate Court or a revisional Court is entitled to apply section 34 while maintaining a conviction. It is true, that section 34 was not applied by the Courts below. The petitioners were not convicted of the offence under section 325 of the Penal Code and in the absence of an appeal against acquittal I cannot convict them of that offence. But I can certainly apply section 34 as regards their liability for the offence under section 323 of the Penal Code. It is a misnomer to call 'acquittal of section 34' inasmuch as section 34 does not create a substantive offence. I would, therefore, alter the conviction of Umrao Singh and Kunwarlal."

Mr. Har Parshad concedes that despite research he is unable to cite any authority holding to the contrary either directly or by way of anology. It thus appears that the solitary judgment bearing directly on the point is clearly in favour of answering the question referred to the Bench in the affirmative.

(8) Apart from authority the issue on principle also appears primarily weighted in favour of the respondent State. Once it is held that section 34, Indian Penal Code, does not constitute a substantive offence, it seems to follow logically that there can be no such thing as an acquittal under this section. To borrow the feliceitous expression of Shiv Dayal J., it is a misnomer to use the expression "an acquittal under section 34". This being so the hypothetical contention of reversing an acquittal under section 34, Indian Penal Code, cannot possibly arise. If as their Lordships of the Supreme Court have categorically laid down that section 34, Indian Penal Code, is a rule of evidence one cannot imagine an acquittal under a rule of evidence. It appears axiomatic that a finding of acquittal is visualised only in the context of a charge for a substantive offence. As section 34, Indian Penal Code, does not constitute a substantive offence there possibly can follow no acquittal thereunder.

(9) Equally well settled it is, that it is difficult, if not impossible, to procure direct evidence to prove the intention of an individual

and in most cases common intention has to be inferred from the act or conduct of the accused person or other circumstances relevant thereto. Common intention, therefore, is usually, if not invariably an inference from the surrounding facts of the case. A finding on the point of the absence or presence of the common intention partakes essentially of the nature of a finding of fact. There is hence no reason why such a finding regarding section 34 should be outside the purview of the appellate Court when all other similar findings of fact are admittedly within its purview. Section 423(1) (b), of the Code of Criminal Procedure, expressly vests the appellate Court with the power of altering a finding in an appeal against conviction. There is thus no manner of doubt that the High Court when seized of an appeal against conviction can consider the evidence and weigh the probabilities. It can accept the evidence rejected by the Sessions Judge and reject the evidence accepted by him. Reference in this connection may be made to *Sher Singh and others* v. *The State of Uttar Pradesh,* (4). It is, therefore, that the powers conferred on the appellate Courts under section 423(1) (b) of the Code of Criminal Procedure would well include within their ambit the right to alter a finding as to the existence of common intention or the absence thereof.

(10) The one fetter which has been placed on the appellate Court's power when hearing an appeal from conviction is that it cannot reverse a finding of acquittal unless there is an appeal against it under section 417, Criminal Procedure Code. This bar is a creature of the statute. It is a technical rule which forbids the recording of a conviction by the appellate Court against an accused person who has been acquitted of a specific offence in an appeal directed against his conviction only. This rule comes into play only when an express finding of acquittal has been recorded on a charge for a substantive offence. To repeat for emphasis it is now manifest that section 34, Indian Penal Code, is not a penal provision and does not constitute a substantive offence. No acquittal can consequently follow thereunder. Therefore the power of the appellate Court to arrive at a contrary finding regarding the absence of the common intention cannot be equated with the reversal of a finding of acquittal, on a substantive charge. It is, therefore, that the bar of the reversal of an acquittal is not even remotely attracted in the context of the application or otherwise of section 34, Indian Penal Code.

(4) A.I.R. 1967 S.C. 1412.

(11) However, it is equally axiomatic that where a finding of the absence of common intention results in an acquittal on a substantive charge it cannot be reversed into a conviction by the appellate Court under section 423(1)(b). Nevertheless though such an acquittal cannot be reversed except in an appeal directed against such an acquittal, the appellate Court is perfectly at liberty to hold on facts that section 34, Indian Penal Code, was applicable even though it was not applied by the Court below. A doubt was sought to be expressed that in cases where more than one person is tried with the aid of section 34, Indian Penal Code, and some of the accused persons have been acquitted (and no appeal has been filed against this acquittal by the State) and the others have been convicted, it would be incongruous for the appellate Court in an appeal filed by the convicts to arrive at a finding regarding the common intention which may be contrary to that of the trial Court. It was sought to be argued that section 423(1)(a) would create a bar against the appellate Court considering even indirectly and incidentally the case against the acquitted persons. A complete answer to this contention is provided by the observations of their Lordships in *Sunder Singh and others* v. *State of Punjab.* (5) where they repelled an identical argument in the following terms :

> "Indeed, an appellate Court, the High Court has to consider indirectly and incidentally the evidence adduced against an accused person who had been acquitted by a trial Court in several cases where it is dealing with the appeals before it by the co-accused persons who had been convicted at the same trial and in doing so, the High Court and even this Court sometimes records its indirect conclusion that the evidence against the acquitted persons was not weak or unsatisfactory and that the acquittal may in that sense be regarded as unjustified, vide *Bimbadhar Pradhan* v. *The State of Orissa,* (6)."

(12) In the light of the fore-going discussion we are of the considered view that the answer to the question referred to the Bench must be returned in the affirmative.

B. S. DHILLON, J.—I agree.

K.S.K.

(5) A.I.R. 1962 S.C. 1211.
(6) A.I.R. 1956 S.C. 469.