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that he is called as his witness and is alleged to belong to the same faction, can be no evidence against the accused. The circumstance that forgery was common in the village, and that Shivlingapa was in April, 1890, in possession of forged documents, cannot rightly be regarded as determining, in any way, the question whether, on the 18th August, 1889, the accused was in possession of the documents then found in his house with such intent as is contemplated in s. 475 of the Indian Penal Code.

The charge framed in this case is far too vague. It imputes to the accused the possession of Exs. 1 to 5 and other papers. The "other papers" referred to comprise no less than 53 documents which were put in at the trial. From a charge so framed the accused could not have learnt what case he had to meet, [194] except as regards the Exs. 1 to 5. The charge should have been framed in the terms of that part of s. 475 of the Indian Penal Code which was applicable to the case, and should have distinctly specified the particular papers bearing a counterfeit mark or device which it was alleged that the accused had in his possession with the intent mentioned in the section. Evidence should then have been admitted in respect of those papers alone. We reverse the conviction and sentence and order that the accused be re-tried by the Court of Sessions with a new jury.

Conviction and sentence reversed, and re-trial ordered.

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APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Birdwood and Mr. Justice Parsons.

QUEEN-EMPRESS *v.* KHANDU VALAD BHAVANI.*

[23rd September, 1890.]

Indian Penal Code (Act XLV of 1860), s. 307—Attempt to murder—Murder.

The accused struck the deceased three blows on the head with a stick, with the intention of killing him. The deceased fell down senseless on the ground. The accused, believing that he was dead, set fire to the hut in which he was lying, with a view to remove all evidence of the crime. The medical evidence showed that the blows struck by the accused were not likely to cause death, and did not cause death, and that death was really caused by injuries from burning when the accused set fire to the hut.

Held (PARSONS, J., dissenting) that the accused was guilty of attempt to murder under s. 307 of the Indian Penal Code.

Per PARSONS, J.—The accused was guilty of murder under s. 302 of the Indian Penal Code.

THIS was a reference, under s. 374 of the Code of Criminal Procedure (Act X of of 1882), for confirmation of the sentence of death passed on the accused.

The accused struck his father-in-law three blows on the head with a stick, with the intention of killing him. He fell down senseless on the ground. The accused, thinking that he was dead, put under his head a box of firewood, and set fire to the hut, in which he was lying, with the intention of removing all evidence of the crime.

* Confirmation Case No. 12 of 1890.

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[195] The accused made the following confession :—

"Seven days ago my wife Sai ran away from my house for five days. She went to wake. On the day following the day on which my wife ran away from my house I went to my father-in-law's at Pimpalgaon Mor. I asked the father-in-law whether my wife had run away to him. He assaulted me. He beat me on the ears and the back with a stick. I then returned to my house at Somaj. After eating my food I again started for Pimpalgaon Mor at 3 o'clock in the night. There is a *vadi* of water-melons in the jungle of Pimpalgaon. He was watching this *vadi*. He had sat near a hut. No one else was present near him at that time. Somaj is one mile off Pimpalgaon. I went to Pimpalgaon with the same stick as is now before the Court. I gave him (my father-in-law) three blows with the stick with force, one on the back and two on his ears—one on each ear. My father-in-law sat at the door of the hut. Immediately after I dealt him three blows he died and fell down on the ground. I kept under his head a box of firewood which was lying in the hut, and setting the hut on fire I returned. I got fire near the hut for rekindling. When I returned I took with me one brass *thali* (pot) and a small bundle of bread which were in the hut. Both these articles were thrown by me into the *doha* (deep part), named Sherad, of the river near Somaj. I took these two things out of the *doha* and made them over to the *patel* and *jaglia* of Pimpalgaon and the *patel* of Somaj. I did not open and see the bundle.

"My wife has been in the habit of running away from my house for five years since. Whenever I go to fetch her, her father and brother beat me. As my father-in-law beat me when I went to bring her, I got angry and killed him. I dealt him three blows with the stick, with the intention of killing him."

The accused adhered to this confession during the preliminary inquiry before the committing Magistrate, but retracted it before the Court of Session.

The Sessions Judge convicted the accused of murder under s. 302 of the Indian Penal Code, and passed a sentence of death, subject to its confirmation by the High Court.

[196] The accused appealed to the High Court.

Balaji Abaji Bhagvat, for the accused.

Shantaram Narayan (Government Pleader), for the Crown.

On the 19th August 1890 the Court (Birdwood and Candy, JJ.) made the following order for the examination of the Civil Surgeon :—

The accused has admitted in the confession made by him to the Second Class Magistrate, that he struck the deceased three blows with a stick, "one on the back and two on his ears—one on each ear." He adds : "Immediately after I dealt him three blows, he died and fell down on the ground. I kept under his head a box of firewood which was lying in the hut. And setting the hut on fire, I returned." This confession was made on the 3rd June 1890, and was adhered to before the Second Class Magistrate on the 16th June, during the preliminary enquiry, but was retracted before the Court of Session. It contains the only statement on the record of the circumstances connected with the death of the deceased, there having been no one present at the time but the deceased and the accused. There appears to be no sufficient ground for holding that this confession was wrongly induced ; and we are of opinion that it can be safely used as evidence against the accused. It shows that he attacked

his father-in-law, the deceased, with the intention of killing him, and that he believed that he had killed him with three blows which he struck with a stick. It shows, further, that when the accused thought that his father-in-law was dead, he placed him, with his head on a box, in the hut in which he used to live, and then set fire to the hut and left him. He thought the deceased was already dead when the hut was set fire to. The object was apparently to remove evidence of the crime—not to make the deceased's death certain, if by any chance he should have been stunned only and not killed by the blows on the back and ears. If this statement of the deceased could be accepted as strictly correct in all its details, there could be no question as to his having caused the deceased's death "by doing an act with the intention of causing death." The acting Civil Surgeon has, however, expressed his belief, in his deposition before the committing [197] Magistrate, that the deceased's death was due to burning and not to the wound on the back of his head. He adds: "The effect of the wound might have stunned, but it would not have caused his death directly." The Civil Surgeon was not examined in the Court of Session; but we think that he ought to have been examined fully as to the nature of the wound described by him and as to his reasons for thinking that it could not be fatal. If the blows struck by the accused were not likely to cause the deceased's death, and did not, as a matter of fact, cause his death, but only stunned him, then in striking the blows he would not have committed murder, but would have been guilty only of an attempt to murder. Whether by striking the deceased or burning him, he certainly caused his death; but if the death was due only to the burning and not to the blows, it would be a question whether the act which really caused death was done with such intention or knowledge as is contemplated in the definition of "culpable homicide" given in s. 299 of the Indian Penal Code. If the burning was the cause of death and the hut was set fire to with the same intention with which the blows were struck, then there could be no question as to the guilt of the accused. He would in that case be guilty of murder. But if the accused really believed that the deceased was already dead when the hut was set fire to, then apparently it would be necessary for us to hold that he could neither have intended by such burning to kill him, nor known that he would be likely to kill him. If, however, the injuries inflicted with a stick were really of a dangerous kind and likely to cause death, then by setting fire to the hut, the accused would merely have accelerated the deceased's death, which in that case could be rightly attributed to the blows inflicted with the avowed intention of killing the deceased. The points in doubt in this case may perhaps be cleared by a further examination of the Civil Surgeon. We, therefore, direct that his evidence be taken with reference to the foregoing remarks.

The confession of the accused should be read to the Civil Surgeon; and he should be asked specially whether the blows described by the accused and the wound examined by him were of a dangerous nature and would have been likely to cause death [198] if the hut had not been set fire to, and whether the injuries caused by the fire were of such a kind that they would of themselves have caused death; and, further, if the wounds inflicted with a stick or other weapon that may have been used were of a dangerous nature, whether he is not of opinion that the burning may have accelerated death and not been the cause of it. The further evidence should be taken in the presence of the accused, and should be certified to this Court within three weeks.

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The Civil Surgeon was accordingly examined; his evidence was to the following effect:—

"On June 1st the dead body of an old man was sent to me for examination. I examined it. It was the body of an old man. I can't give his age. It was much decomposed when I received it. I found on the left side beneath the arm an opening in the body communicating with the abdomen through which some of the viscera were protruding. The skin was much charred and extensively decomposed, and I cannot consequently state how this wound was caused. There was an inches wound, two inches long, extending to the bone on the occipital region. The skin itself was not injured. I did not open the head. The back of the trunk was extensively charred, as also the skin on the back of the legs and buttocks. I did not open the body. I have heard the statements made by the accused. The wound on the head was from a dangerous blow, but would not, I think, have been likely to cause death. I only found the wound on the head. The opening in the side did not look like the result of a blow from a stick. I thought it resulted partly from the charred state of the skin and partly from the decomposed state of the body. *The injury to the head would not, in my opinion, have caused death if the hut had not been set fire to. I think the burning caused death, and did not merely accelerate it.* The blow on the head would probably have caused concussion of the brain. The injuries caused by the burning are such as would have caused death. Deceased would have been likely to have fallen senseless from the blow on the head the mark of which I saw.

"Cross-examined:—I do not think that deceased died immediately after receiving the blow."

On receipt of this evidence the case was further argued, and the following judgments were delivered:—

JUDGMENTS OF THE DIVISION BENCH.

BIRDWOOD, J.—We have now received the medical evidence called for in our order of the 19th August. It is to the effect that the death of the deceased was not caused by the blows struck by the accused, and that those blows, moreover, were not likely to cause death. They probably, however, stunned the deceased. Death was really caused by the injuries from burning, when the accused set fire to the deceased's shed. It was not [199] merely accelerated by the burning. Reading the medical evidence with the accused's confession, I have no doubt that the accused believed the deceased to be already dead when he set fire to the shed.

The accused admits that he struck the deceased with the intention of killing him. In intention, therefore, he was a murderer. But on the evidence, such as it is, it must be found that the striking did not amount to murder. It was, however, an attempt to murder. The accused must also, I think, be taken to have set fire to the shed in order to remove evidence of the murder which he thought he had committed, though he himself does not give any such explanation of his conduct. By setting fire to the shed, however, he actually caused death; and the question in this case, arising with reference to the definition contained in s. 299 of the Indian Penal Code, is whether he set fire to the shed with the intention of causing death or with the intention of causing such bodily injury as was likely to cause death or with the knowledge that death was likely to be caused by the act. As I am of opinion that the accused thought, when he set fire to the house, that the deceased was already dead, I cannot hold

that the act of setting fire to the shed by which the death was caused was done with such intent or knowledge as is contemplated in s. 299 of the Indian Penal Code. It is not as if the accused had intended, by setting fire to the shed, to make the deceased's death certain. I do not believe that that was his intention. If that had been the case, I should have no difficulty in upholding the conviction. I would, therefore, alter the conviction to one under s. 307 of the Indian Penal Code; and as hurt was caused, I would sentence the accused to transportation for life. As Mr. Justice Parsons does not concur in this opinion, the case must be laid before another Judge under s. 378 of the Code of Criminal Procedure.

PARSONS, J.—I am unable to agree with my learned colleague that the offence of which the accused is guilty, is only an attempt to murder. In my opinion it is murder. The accused with the deliberate intention of causing the death of his father-in-law gave him three blows on the head. He then took the body, put [200] a deal box under its head, and set fire to the hut in which it was. The result was that the father-in-law, who had not been killed but only stunned by the blows, was burnt to death. My learned colleague holds that the accused is not guilty of murder, because when he set fire to the hut he thought that his father-in-law was dead, and his object in setting fire to the hut was apparently to remove evidence of the crime, and not to make the deceased's death certain. Assuming that this mistake of fact, if it existed, would be a valid plea in the defence of the accused, I am of opinion that the evidence on the record is insufficient to warrant any supposition of change of intention. It is true that the accused says that immediately after he dealt the three blows, his father-in-law died and fell down on the ground, but he does not say that he in any way satisfied himself that he was actually dead or even that he thought that he was dead, still less does he say that his intention in setting fire to the hut was to conceal his crime. He does not say what his intention was. This being so, I think the presumption of law is that in all that he did he was actuated throughout by one and the same intention. There is no evidence or proof of any change therein. There is then the intention of the accused to cause death and there are two acts committed by him which together have caused death—acts so closely following upon and so intimately connected with each other that they cannot be separated and assigned the one to one intention and the other to another, but must both be ascribed to the original intention which prompted the commission of those acts and without which neither would have been done. In my opinion, the accused in committing those acts is guilty of murder. The murder was a very deliberate, cold-blooded and brutal one, and I would confirm the sentence of death. As, however we differ as to the actual offence of which the accused ought legally to be convicted, the case must be laid before another Judge. I may add that if the offence is held to be only attempt to murder, I agree with the sentence which my colleague proposes to pass for that offence.

In consequence of this difference of opinion the case was referred to Sargent, C.J.

[201] The following judgment was delivered by the learned Chief Justice:—

JUDGMENT.

SARGENT, C. J.—It is to be regretted that the attention of the Civil Surgeon was not drawn to the statement of the prisoner that he struck

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the deceased three blows, two of which were on the ears, and that he was only questioned as to the probable consequences of the wound on the back of the head. Having called for and seen the stick with which the blows were struck, I think there is but very little reason for doubt, more especially as the deceased was a leper in a feeble state, that the blows proved fatal, as the accused himself says, was the case. But, assuming that the deceased would not have died from the effect of the blows, I agree with Mr. Justice Birdwood that as the accused undoubtedly believed he had killed his victim, there would be a difficulty in regarding what occurred from first to last as one continuous act done with the intention of killing the deceased. Under the circumstances the offence should be held to have been only the attempt to murder, and that the sentence should be transportation for life under s. 307.

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15 B. 201.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

MURARI VITHOJI AND OTHERS (*Original Defendants*), *Appellants* v. MUKUND SHIVAJI NAIK GOLATKAR AND OTHERS (*Original Plaintiffs*), *Respondents.** [2nd December, 1890.]

Hindu law—Partition—Joint family—Separate enjoyment of portions of family property for several years—Entries in survey records—Dealings with portions of property—Sole enjoyment of a certain property by a branch of the family—Separate acquisition.

In a partition suit it being found that the several branches of a Hindu family had lived separate for forty or fifty years, had enjoyed during that period separate and distinct portions of the family property or portions of the property in regular rotation and had dealt with the separate portions in every respect as their own property, and that in the survey records the lands were entered in the names of the several branches in respect of their separate shares.

[202] *Held*, that this evidence as to the mode of enjoyment by the several branches of the family during so long a period ought to be taken as establishing a tacit agreement of enjoyment according to their shares.

There being no evidence on the record to show when and by what member of the family certain property in the possession of a particular branch of the family was acquired, and the entry in the survey records with respect to it being different from that of the ancestral fields, that is, the entry being in the name of the representative of that particular branch with no sub-division of shares, and the party seeking partition of such property having failed to give evidence to rebut the presumption arising from the sole enjoyment of the particular branch and the entry in the survey records.

Held, that such property was the separate acquisition of that particular branch.

Moro v. *Ganesh* (1), *Appovier's Case* (2), *Bannoe* v. *Kashi Rám* (3), referred to.

[R., 10 Ind. Cas. 967 = 4 S.L.R. 225 ; 13 Ind. Cas. 225 = 5 S.L.R. 107 ; 20 C.L.J. 32.]

THESE were cross-appeals from the decision of Khan Bahadur M. N. Nanavati, First Class Subordinate Judge of Ratnagiri.

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* Cross Appeals Nos. 98 and 137 of 1888.

(1) 10 B.H.C.R. 444. (2) 11 M.I.A. 75. (3) 3 C. 315.