APPELLATE CRIMINAL.

Before U Thein Maung, Chief Justice, and U San Maung, J.

MAUNG MYINT (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

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Apl. 9.

Penal Code, s. 302 read with s. 34—Common intention necessary inference—Alteration of sentence on appeal.

Held by the Bench : Essence of joint liability under s. 34 of the Penal Code is the existence of a common intention leading to doing of a criminal act in furtherance of such intention. Such inference of common intention should not be reached unless it is a necessary inference. "Necessary inference" must mean the only reasonable inference possible, not merely the probable inference; from the mere fact that the accused were all armed it cannot be said that the only necessary inference was that they intended to kill as well as rob passengers.

Mahbu Shah v. *King-Emperor*, 72 I.A. 148, applied.

King-Emperor v. *Nga Aung Thein and another*, 13 Ran. 210 (F.B.), referred to.

Barendra Kumar Ghosh v. *Emperor*, 52 Cal. 197 (P.C.), referred to.

Held further : Though conviction under s. 302 read with s. 34 could not stand the accused could be convicted under s. 394, Penal Code, as jointly concerned in committing robbery in which hurt was caused by fellow robbers. The accused could have been separately charged under ss. 323, 392 and 394. It would be permissible to alter the offence to one under s. 394 of the Penal Code and the appellate Court may alter the charge or finding.

Lala Ojha v. *Queen-Empress*, 26 Cal. 863, followed.

Conviction altered into one under s. 394 of the Penal Code and accused sentenced for transportation for life.

Held per Chief Justice : The true test for alteration of conviction is whether the facts are such as to give the accused notice of offence for which he is going to be convicted though not charged and that the accused is not prejudiced by the mere absence of a specific charge.

Meher Sheikh and others v. *Emperor*, A.I.R. (1931) Cal. 414, applied.

Wallu v. *The Crown*, (1923) I.L.R. 4 Lah. 373, distinguished.

Begu v. *King-Emperor*, (1925) I.L.R. 6 Lah. 226 (P.C.), referred to.

Ba Soe for the appellant.

Ba Sein (Government Advocate) for the respondent.

*Criminal Appeal No. 217 of 1948 being appeal from the order of 3rd Special Judge of Insein, dated the 28th February 1948, passed in Criminal Regular Trial No. 120 of 1947.

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U SAN MAUNG, J.—The appellant, Maung Myint was convicted by the 3rd Special Judge (U Thein Pe) of Insein for an offence punishable under section 392 of the Penal Code and was sentenced to ten years' rigorous imprisonment. He was also convicted for an offence punishable under section 302 read with section 34 of the Penal Code and was sentenced to death.

The robbery and the murder which took place in the course of the same transaction occurred in a railway carriage at about 3 p.m. on the 21st February 1947, while the 2-Down train from Mandalay to Rangoon was travelling between Pegu and Dabein. Ma Khin Shwe (P.W. 9), one of the passengers of that carriage, was seated near the rear end of that carriage with her face in a southerly direction, when she heard voices and the sound of firing at a spot behind her. She turned round to look and saw three men whom she took to be *lusoes* standing close to each other. One was armed with a dagger and a hand grenade while another had a revolver with him. She did not know what the third *lusoe* had. One of the *lusoes* ordered the passengers to raise their hands and she was one of those who obeyed that command. She was robbed of three rings and Rs. 65 in cash by the accused who was armed with a hand grenade at the time he robbed her. When the train subsequently slowed down, two of the robbers escaped from the train and one of them was subsequently shot dead by the police who were in the train. The *lusoe* who remained hiding in the front part of the carriage was arrested and he was recognized by her as the accused who had robbed her.

Maung Chit (P.W. 10) was also seated near the rear end of the carriage when the incident occurred. He did not recognize any of the *lusoes* as he dared not look at them, but he knew that one *Hamid* who was

seated behind him was stabbed and shot. Ali Meah (P.W. 11), who was seated face to face with Ma Khin Shwe (P.W. 9) near the rear end of the carriage, recognized the accused as the *lusoe* who robbed him of his shirt containing Rs. 180 in cash. According to him, the accused was armed with a revolver at that time, while of the two companions of the accused one was armed with a hand grenade and the other, a revolver. Mutu Rahman (P.W. 12), who was seated near Ali Meah (P.W. 11), saw three *lusoes* of whom one was armed with a revolver, the other a hand grenade, and the third, a dagger. The *lusoe* with the revolver shot Hamid, while the *lusoe* with the dagger, whom he recognized as the accused, robbed him of Rs. 165. When the train slowed down, two *lusoes* jumped down from the back part of the carriage in an attempt to escape, while the third who sat down near a door in the front part of the carriage and was later arrested, was the accused. In cross-examination, this witness varied the statement made in his examination-in-chief, by saying that the accused was armed with a revolver as well as a dagger, that the second *lusoe* was armed with a hand grenade and that he did not know what the third *lusoe* had.

Jawalal Shariar (P.W. 13) was seated near the latrine in the middle part of the carriage when, on hearing the sound of firing from the rear part of the train, he ran to the front part of the carriage, which was a long one, in an attempt to get as far away from the scene of incident as possible. Being too fat, he could not follow the example of those who sought safety under the seats. He saw an Indian fall down from his seat, on being attacked by *lusoes*. He also saw this Indian get up and come to the front part of the carriage, bleeding, and fall down again on reaching

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near him. Two of the three *lusoes* who were in the carriage were armed with revolvers, and one of them, who appeared to be the leader, went on firing his revolver, while his two companions robbed the passengers. He himself was robbed of his money by the accused. His coat containing a cheque was also taken away by one of the *lusoes* and it was subsequently found on the person of the *lusoe* who was shot dead as he attempted to escape. The *lusoe* who fired his revolver all the time escaped, while the *lusoe* who robbed him of his money was found hiding in the carriage and was arrested. This was the accused. He (witness) cannot say whether the accused was armed with a revolver or a dagger.

One witness whose evidence was not made use of by the trial Judge (U Thein Pe) is Maung Kyaw Soe (P.W. 2) who was examined by his predecessor U Hla Pe. This witness, who was seated by the side of the murdered Indian (Hamid) at the time of the occurrence and who said that he was roused from sleep on hearing the sound of firing, at first gave evidence which goes to suggest that the accused was one of the two *lusoes* who were seen struggling with the Indian. Later, he changed his statement and said, "I am unable to say if the accused was the *lusoe* who held the revolver and struggled with the Indian near me. I saw one man with a revolver in his hand struggling with the injured Indian. Another *lusoe* who struggled with the injured Indian was armed with a dagger and a hand grenade. This *lusoe* robbed my properties. He is not the accused." He was not even definite as to whether the accused was one of the three robbers. All he could say definitely was that the accused who was later found hiding in the carriage was denounced by the passengers as the *lusoe* with the revolver.

As already mentioned above, when the train slowed down, two of the robbers jumped from the carriage and made an attempt to escape. This was seen by Maung Po Thit (P.W. 1), Special Sub-Inspector of Police, Dabein, who was on patrol duty near Railway Bridge No. 32 known as Kyonta Bridge, with his Special Police Reserves, Maung San Dok (P.W. 23), the Head Constable of the Mandalay Armed Police, and the Armed Police Railway escort under him, as well as by Havildar Saw Aung Bwint (P.W. 3) of the Frontier Constabulary Battalion, Taunggyi, and the men under him, who were travelling from Thazi to Rangoon. The combined fire of the railway escorts, the police reserves patrolling the area, and the Frontier Constabulary had the effect of bringing down and killing one of the two robbers who attempted to escape, at a spot about 100—150 yards from the train. With the robber was found the coat belonging to Jawalal Shariar (P.W. 13) and a Shan-bag (Exhibit 1) containing among other things some of the property robbed from Ma Khin Shwe (P.W. 9), Maung Chit (P.W. 10), Ali Meah (P.W. 11) and the deceased Hamid. Two railway tickets for the journey from Pegu to Dabein, and a handkerchief were also found near the dead robber.

The injured passenger (Hamid) was brought to the General Hospital, Rangoon, in a semi-conscious state and he later died of the injuries received by him. These consisted of six gunshot wounds (of which three were entrance wounds and three exit wounds) and a stab wound which penetrated the chest cavity and injured the middle lobe of the right lung. Death was due to the stab wound and the gunshot wound on the chest, each of which was sufficient in the ordinary course of nature to cause death.

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On the evidence on record there is no doubt whatsoever that three robbers attacked the carriage in which the deceased Hamid, and the witnesses Ma Khin Shwe (P.W. 9) and others were travelling, and that the accused Maung Myint was one of them. His defence that he was an innocent passenger, who had boarded the train at Htongyi and who was wrongly accused by his fellow passengers, has been rightly rejected by the learned trial Judge. It is a matter, however, for consideration whether the accused has been rightly convicted of the offence punishable under section 302/34 of the Penal Code for the murder of Hamid in furtherance of common intention. There is no evidence, whatsoever, to show that he was one of the two robbers who actually attacked Hamid with a revolver and a dagger. (Hamid was obviously shot three times with a revolver and stabbed once with a dagger.) The witnesses are also at a variance as to the nature of the weapon with which the accused was armed, at the time of the robbery. Ma Khin Shwe (P.W. 9) said that he was armed with a hand grenade at the time he robbed her, while according to Ali Meah (P.W. 11), who sat opposite her, the accused was armed with a revolver at the time he robbed him. Mutu Rahman (P.W. 12) who was seated near Ali Meah said that he saw a dagger with the accused at the time the accused robbed him. As it was highly improbable for the accused to have changed his weapon in quick succession while he robbed these three persons, the most that can be said from the evidence on record is that the accused was armed with some such weapon as a hand grenade, or a revolver, or a dagger, at the time of the robbery. No weapon was found on him at the time of his arrest, but he had with him four Sten-gun cartridges, which could be used with a ·38 bore revolver [*see* the evidence of Maung San Dok (P.W. 23)].

Now, the question involved is whether in these circumstances it is necessary for the Court to infer that there was a common intention on the part of the accused and the two other robbers who actually committed the murder of Hamid, not only to rob the passengers in the carriage, but also to murder them if necessary. As held by their Lordships of the Privy Council in the case of *Mahbub Shah* v. *King-Emperor* (1), the essence of joint liability under section 34 of the Penal Code is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention, and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to a pre-arranged plan. Their Lordships also pointed out therein, that the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a *necessary* inference drawn from the circumstances of the case.

The words "necessary inference" must mean the only reasonable inference possible, not merely a "probable" inference from the facts appearing in evidence. Bearing this fact in mind, it is to be considered whether on the evidence on record, the only possible inference is that the accused in common with his two companions intended to murder the passengers as well as to rob them. There is no evidence to show that the accused came into the carriage at the same time as his companions. Furthermore, there is nothing to show that he had abetted the murder of Hamid either by words or by deed. No doubt the robbers were armed with such lethal weapons as revolver, dagger and hand grenade.

(1) 72 I.A. 148.

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However, from this fact alone, it cannot be said that the only necessary inference is that they intended to kill as well as to rob the passengers. Some robbers do carry such lethal weapons with no other intention than to overawe.

No doubt, in the case of *King-Emperor* v. *Nga Aung Thein and another* (1), a Full Bench of the Rangoon High Court while holding that no presumption, either of fact or in law, arises in such cases and that each case must be decided on its own facts, thought fit to observe that the ascription of a common intention to add murder, if necessary to robbery is not easily avoided, where all, or some to the, knowledge of the rest, of those engaged in the enterprise are found to have carried firearms and firearms have been used with fatal effect. However, it will be noticed that the language used was guarded and that the learned Judges merely said that "the ascription of a common intention to murder is not easily avoided." This is quite a different thing from saying that the existence of such a common intention must necessarily be inferred—which is the standard of proof which the law now requires for this purpose. The circumstances in the case of *Barendra Kumar Ghosh* v. *Emperor* (2), relied upon in *King-Emperor* v. *Nga Aung Thein and another* (1), are much stronger than those in the present. There, the accused who was one of the men who attempted to rob the postmaster at Sankaritolla Post Office, was one of the three men who entered the room and fired at the postmaster, and might be the man who actually fired the fatal shot.

For these reasons, we hold that the conviction of the accused under section 302 read with section 34 of

(1) 13 Ran. 210 (F.B.). (2) 52 Cal. 197 (P.C.).

the Penal Code for the alleged murder of Hamid in furtherance of common intention cannot be allowed to stand.

The accused should have been convicted of an offence punishable under section 394 of the Penal Code as one jointly concerned in committing a robbery in which hurt was caused by his fellow robbers, as there can be no doubt that besides receiving the fatal wounds Hamid received injuries which amounted to hurt and to grievous hurt. The question is whether the conviction of the accused under section 302/34 of the Penal Code, can, in the circumstances of this case, be altered in appeal to one under section 394 of the Penal Code. Now, from illustration (*m*) to sub-section (3) of section 235 of the Code of Criminal Procedure, it is clear that if a person commits robbery on another, and in doing so voluntarily causes hurt to him, that person may be separately charged with and convicted of offences under sections 323, 392 and 394 of the Penal Code although, of course, he cannot, under section 71 of the Penal Code, be punished with a more severe punishment than the Court which tries him can award for any one of such offences. Therefore, as in this case, the accused was wrongly charged and convicted of murder in furtherance of common intention, committed in the course of a robbery in which he was concerned, it would be permissible to alter the offence under section 302/34 of the Penal Code to one under section 394 of the Penal Code. As held by a Bench of the Calcutta High Court in the case of *Lala Ojha* v. *Queen-Empress* (1), if the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for

(1) 26 Cal. 863.

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which he should have been properly charged and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding.

The learned counsel for the appellant who accepted notice of the proposed alteration of the finding by this Court and was given an opportunity of adducing arguments against it, said that he had nothing to say in the matter. In our opinion, the accused cannot be considered to be prejudiced by the alteration in the finding of the offence under section 302/34 of the Penal Code to one under section 394, because, even if a charge under section 394 had been framed by the trial Court, his defence could not have been otherwise than that raised in that Court.

In the result, the appeal of the accused Maung Myint succeeds in part. The conviction under section 302/34 of the Penal Code is altered to one under section 394 of the Penal Code and the sentence of death is altered to transportation for life. The conviction under section 392 of the Penal Code is confirmed, but the sentence of ten years' rigorous imprisonment thereunder is set aside as the appellant cannot be sentenced both under section 394 of the Penal Code and under section 392 of the Penal Code, *vide* section 71 of the Penal Code.

U THEIN MAUNG, C.J.—I agree. I am of the opinion that the alteration of the conviction under section 302/34 of the Penal Code to one under section 394 thereof is warranted by the Code of Criminal Procedure inasmuch as the murder with

which the appellant was charged under section 302/34 was really a part of the same transaction with the robbery for which the appellant has also been charged under section 392 of the Penal Code. As has been pointed out in *Meher Sheikh and others* v. *Emperor* (1), "The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge."

In this particular case there can be no doubt that the accused had notice of the offence for which he is going to be convicted, that is, of the offence of robbery in the course of which one of the robbers committed murder.

It has been held in *Wallu* v. *The Crown* (2) that where an accused person has been charged only with murder and has been convicted and the conviction is set aside by the High Court on appeal that Court cannot alter the conviction to one under one of the sections of the Penal Code dealing with offences against property. However, that case is distinguishable inasmuch as the accused there had been charged only with murder, whereas in the present case the appellant has been charged not only with murder but also with the offence of robbery in the course of which the murder was committed. [See also *Begu* v. *King-Emperor* (3).]

(1) A.I.R. (1931) Cal. 414. (2) (1923) I.L.R. 4 Lah. 373.
(3) (1925) I.L.R. 6 Lah. 226 (P.C.).