CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ.

1914

Feb. 3.

PROKASH CHANDRA KUNDU

v.

EMPEROR.*

Rioting—Assaulting a public servant in execution of duty—Power of excise inspector or sub-inspector to enter a house to arrest without warrant persons found illicitly distilling liquor—Search—Formalities before search—Penal Code (Act XLV of 1860) ss. 147 and 353—Bengal Excise Act (Ben. V of 1909) ss. 67 and 70—Rules by Local Government —Rule 75—Instructions of Board of Revenue—Chapter X, Rule (8).

Section 67 of the Bengal Excise Act (V of 1909) confers wider powers on excise officers than were given under the former Act. Under section 67, read with rule 75 of the Rules framed by the Local Government, an excise inspector and sub-inspector may enter a house for the purpose of arresting without a warrant a person found in the illicit distillation of liquor.

Section 67 does not relate to any search, and an excise officer not below the rank of a sub-inspector entering a house for the purpose mentioned therein, is not required to comply with the formalities prescribed in Chapter X, rule (8), of the Instructions of the Board of Revenue, unless he finds it necessary further to make a search in the house.

Where an excise sub-inspector, accompanied by a constable and two chowkidars and excise peons, went to the house of the accused in order to arrest without warrant persons found in the act of illicit distillation of liquor, and were attacked and beaten by them before they had time to enter or search the same :—

Held, that they were acting legally under section 67 of the Bengal Excise Act, and that the accused were rightly convicted under sections 147 and 353 of the Penal Code.

On a charge of rioting, with the common object of assaulting public servants, persons shown to have committed a separate offence under section 353 of the Penal Code may be separately sentenced thereunder.

Formalities required by law prior to search considered.

* Criminal Revision No. 5 of 1914, against the order of S. C. Sen, Deputy Magistrate of Hooghly, dated Dec. 20, 1913.

1914

PROKASH CHANDRA KUNDU v. EMPEROR.

UPON the receipt of information of illicit distillation of liquor in the house of the petitioner Bhusan Dulai, at Naranpur, in the district of Hooghly, a Deputy Inspector of excise, accompanied with two excise sub-inspectors and peons, a constable and two chowkidars, went to the village, in the early hours of the 24th October 1913, to arrest persons engaged in such distillation. When he arrived near the house, he sent one of the excise sub-inspectors with some peons, the constable and the chowkidars, to surround the house of Bhusan Dulai and arrest the offenders, and proceeded with the rest of the party to another part of the village. The Dulais, who were found distilling liquor, fell upon and attacked the former as they approached the house, and before they had time to enter or search the same. They were joined by two others of better position, Prokash Chandra Kundu and Basanta Bhattacharjee. The former was alleged to have beaten two peons with a lathi, and Bhusan assaulted a chowkidar. The Dulais were said to have then removed the distilling apparatus.

The petitioners were tried in respect of the above occurrence by Babu M. N. Bose, Sub-Deputy Magistrate of Arambagh, on two charges (i) of rioting under section 147 of the Penal Code "with the common object of assaulting excise officers and other public servants"; and (ii) of assaulting excise peons (named) and the chowkidar (named) "with the object of deterring them from public duty, viz., the detection of illicit distillation" under section 353 of the Penal Code. They were all convicted under section 147, on the 19th November 1913, and sentenced to two months' rigorous imprisonment each, while the first and third were also convicted and sentenced, under section 353, to a further term of imprisonment for the same period. They appealed to the District Magistrate of Hooghly

1914

PROKASH CHANDRA KUNDU v. EMPEROR.

who, by his order dated the 20th December 1913, upheld the convictions and sentences. The petitioners then obtained the present Rule on the grounds set forth in the judgment of the High Court.

Mr. A. Caspersz (with him *Babu Monmatha Nath Mookerjee*), for the petitioners. The excise officers surrounded the house of the accused but nothing incriminating was found. They did not comply with the preliminary formalities prescribed by the law before search. It would be most dangerous to hold that they were justified in acting as they did. The petitioner Prokash was not connected with the offence and took no part in it. The separate sentences under section 353 of the Penal Code are not legal.

The Deputy Legal Remembrancer (*Mr. Orr*) (with him *Babu Srish Chandra Chowdhry*), for the Crown. The excise inspector and sub-inspector were acting legally under section 67 and were empowered to enter the house. Refers to Rule 75 of the Rules made by the Local Government. There was no search and Rule 8 of Chapter X does not apply, in the facts of the case. The offence under section 353 was a separate one, and the sentences thereunder are not illegal.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling on the District Magistrate of Hooghly to show cause why the conviction and sentence passed on the petitioners should not be set aside or otherwise modified as to this Court may seem good on the grounds, *first*, that there having been no search in accordance with the provisions of the law, and the excise officers not having observed any of the formalities required by law, the resistance offered to them was not unlawful, and the conviction under section 147

is bad in law; and, *secondly*, that the excise officers were not acting in the exercise of their duty, and the conviction under section 353 of the Indian Penal Code is, therefore, bad in law.

We have had the provisions of both the Excise Acts, of 1878 and the present Act V of 1909 (B.C.) laid before us, and we find that the provisions of the new Act are substantially the same as that of the old, but are stated with much greater clearness and in much greater detail. We may remark that in one particular, with which we are specially concerned in this case, section 67 gives wider powers to excise officers than any powers that were given to them by the Act of 1878. Section 67 says: "any officer of the excise" which would include a peon, "may, subject to any restrictions prescribed by the Local Government by rules made under section 85, arrest without warrant any person found committing an offence punishable under section 46," and for the present we need not concern ourselves with sections 68, 69 and 70 which prescribe a formal procedure upon information "to the Collector, to any Collector or Magistrate, or to a Collector or excise officer not below such rank as the Local Government by notification may prescribe."

What is stated in this case is that the Deputy Inspector of Excise had information that he would find certain persons in the act of illicitly distilling liquor if he went to this village. He accordingly went with two sub-inspectors and a large number of peons, who from the finding actually saw the appellants and their men removing the distilling apparatus, which the Magistrate found they probably afterwards destroyed, as no traces of it have been found. But before they had time to enter the house and arrest these persons or to make any search whatever, the accused sallied out and proceeded to beat the peons.

1914

PROKASH CHANDRA KUNDU v. EMPEROR.

The unlawful assembly was joined by two men of higher rank, Prokash Chandra Kundu and Basanta Bhattacharjee, and the finding is clear that these two men were actually found taking part in the rioting. But as regards the accused Basanta, the first Court held that, inasmuch as he did not take any active part in the assault, he might be absolved from the charge under section 353, which was a separate substantive charge and not raised by implication under section 149.

Taking then the simple facts, it would appear that these officers were acting under section 67 of Act V of 1909, and that before they had time to do anything lawful or unlawful, they were wantonly assaulted by the Dulais, encouraged and assisted by the other two petitioners, Prokash and Basanta. That being so the legal questions on which the Rule was issued do not seem to arise. There was no search and, therefore, it cannot be said that there was a search not in accordance with the provisions of the law, and there were no formalities to be observed at the time the assault was committed.

We wish to make it clear what it is that the law requires in the way of formalities. There are two portions of the rules made under section 85 which deal with the duties of officers in this respect. The one is rule 75 at page 69 of the rules dealing with restrictions of the exercise of powers conferred by sections 66 and 67, and that says : "officers below the rank of sub-inspector of excise may exercise in open places only the power conferred by section 67." The expression "open place" in this rule means open in the ordinary sense as opposed to closed, but does not include a dwelling house. Obviously two Sub-Inspectors and a Deputy-Inspector being present there was no restriction on their entering the house for the purposes

mentioned in section 67. But as a matter of fact, as we have seen, they did not enter the house.

Then there are the provisions of Chapter X of the rules dealing with detection, investigation, and trial of offences. Rule 8 of that Chapter lays down that the provisions of the Criminal Procedure Code, especially sections 101, 102 and 103 which apply to searches, must be carefully observed by the officer who makes a search with or without warrant. Every officer who conducts a search will fill up Form 126. When a search is made without warrant, the officers conducting the search will record either separately, or at the foot of the counterfoil of Form 126, the grounds of his belief that an offence punishable under sections 46, 48, 52 or 53, has been committed and the reasons for considering that it is not advisable to obtain a search warrant. Here again this rule has no application to this case; because no search was made. But supposing that the officer had entered the house under section 67 and tried to arrest without warrant any person found illicitly distilling, or to seize and detain any article which he had reason to believe to be liable to confiscation under the Act, or detain and search any person upon whom, and any vessel, raft, vehicle, animal, package, receptacle or covering in or upon which he may have reasonable cause to suspect any such article to be, it would not have been necessary for him to record his reasons before acting under section 67. If he was acting under section 70, the letter of the law appears to make it necessary that the ground of his belief should be recorded before he enters to search any place. But the provisions of section 67 are not with regard to the searching of any place. They are with regard to the arrest of any person openly committing an offence, whether in a house or in the open; and the officer who is empowerd to arrest under

1914

PROKASH CHANDRA KUNDU v. EMPEROR.

section 67 in a house, that is, any officer of the rank of sub-inspector or above it, need not fill in the Form 126, unless he finds it necessary further to make a search in the house. Then he will fill up the form for the information of the authorities, and he will record at the foot of the counterfoil of the form the ground of his belief, etc. But here, as we have said, there was no occasion for a formal search; certain persons were seen committing an offence, and before they could be arrested the excise officers were beaten in the open, and the articles which constituted the evidence of the offence were removed.

That being the finding, we think it is clear that the assault upon these officers was wholly unjustifiable, and that the riot was one of a very lawless and serious nature, and that the petitioners have been very leniently dealt with.

As regards the separate sentence under section 353, it is clear that persons who are shown to have committed a separate offence under section 353 should receive a separate punishment even although the common object of the riot is to commit that offence; and the argument of the learned counsel that as the accused Basanta Bhattacharjee was acquitted, he, therefore, cannot be convicted under section 147 with the common object of committing an offence under section 353, shows to what an *impasse* any doctrine to the contrary would lead us. The rulings of this Court have for a long series of years been to the effect that separate sentence should not be passed upon people convicted of rioting for the offence which is specifically stated to have been the common object of the assembly, unless, as has been held in several cases, a specific charge is laid against the individual members of committing such an offence. In this case it would appear that all the offenders were rightly convicted

of rioting and that two of the petitioners were also found to have taken part in the assault, whereas the second petitioner, Basanta Bhattacharjee, was found to have taken no part in the actual assault. But it is clear that the encouragement of riot of this kind is quite sufficient to bring him within the purview of the law of rioting; and it is also clear that those persons who committed separable acts of assault should be more severely punished than those who did not. The question is rather an academical one, inasmuch as the whole of the sentence which is passed could very well have been given under the rioting section without having recourse to the other section.

For all these reasons, we are of opinion that the Rule must be discharged. The petitioners will surrender to their bail and serve out the remainder of their sentence.

E. H. M. *Rule discharged.*