

CRIMINAL REFERENCE.

Before Holmwood and Sharfuddin, JJ.

EMPEROR

v.

MADAN MANDAL AND OTHERS.*

1913
Dec. 3.

Criminal Trespass—Unanimous Verdict of Jury—Criminal Procedure Code (Act V of 1898), s. 307—Reference to High Court whether permissible in such a case—Penal Code (Act XLV of 1860), ss. 148, 304, 326, 149—Absence of charge—Acquittal.

Criminal trespass depends on the intention of the offender and not upon the nature of the act and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of the *bund* belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence.

Where the verdict of the jury is unanimous and the Judge has agreed with it, he can make no reference under s. 307 of the Criminal Procedure Code.

Where the accused were charged under ss. 148, $\frac{304}{109}$, and $\frac{326}{149}$, and the Jury found them guilty under s. 326 only:—

Held, that the verdict of the Jury under s. 326 was a judgment of acquittal inasmuch as there being no charge under that section indopendently, there could be no verdict given upon it.

Reazzuddi v. King-Emperor (1) and *Panchu Das v. Emperor* (2), referred to.

THIS was a reference from the learned Additional Sessions Judge of the 24-Perganas, and an application for admission of appeal by one Kala Chand whom the Jury unanimously found guilty of an offence

* Criminal Reference, No. 28 of 1913, (with Criminal Appeal No. 993 of 1913) by the Additional Sessions Judge of 24-Perganas, dated Sept. 16, 1913.

(1) (1912) 16 C. W. N. 1077.

(2) (1907) I, L. R., 34 Calo. 698.

under s. 304 (first part) of the Indian Penal Code. It appears that the said Kala Chand was tried along with four others who were charged under ss. 148, $\frac{304}{149}$, and $\frac{326}{149}$ of the Indian Penal Code. Against these four the Jury returned a verdict of guilty under s. 326 without the aid of s. 149. The Judge sentenced Kala Chand to transportation for life but, despite his agreement with the Jurors in the view that they took of the offence of the other four, he referred the case to this Court on the substantial ground that the verdict was illegal inasmuch as the accused were charged under s. 304 read with s. 149 and s. 326 read with s. 149.

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The letter of reference was as follows :—

“ I have the honour to make a reference under s. 307, Criminal Procedure Code to the Hon'ble High Court in the case of *Emperor v. Madan Mandal* and four others. The Jury have unanimously found one accused, Kala Chand, guilty under s. 304, Part I and I have sentenced him to transportation for life. The other four accused persons were charged under ss. 148, 304-149 and 326-149. The Jurors have acquitted them of the charge of rioting, but have found them guilty under s. 326 without the aid of s. 149. There was no charge against the prisoners under that section. Nor was there any wound amounting to grievous hurt that could have been inflicted by any of these four accused persons. There is no evidence that any one of the four inflicted any particular wound. The evidence is only that these four persons armed with lathies joined with Kala Chand (who used a spear) in beating two men, Adel and Panchu. Adel and Panchu had 15 spear wounds and died from their effects. But they had only three lathi wounds between them, and it is not known who inflicted those nor do they amount to grievous hurt.

The conviction of these four men under s. 326 is therefore not only illegal because there was no charge against them, but is also unsustainable on the facts. I therefore think it necessary to refer the case to the Hon'ble High Court in order that the conviction of these four men under s. 326 may be set aside or altered.

The question remains whether on the finding of the Jury the accused persons ought to be convicted under s. 326, read with s. 149. The facts of the case, as found by the Jury, are these. The houses of Adel and Panchu were flooded by excessive rain. In order to get rid of the

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water, they cut the *Ail* connecting their field with that of the accused. There was a drain in that field, but it was made by Madan himself and there is no evidence that it was ever connected with the field of Adel and Panchu. That drain led into Madan's tank, but Madan had blocked the outlet. Adel and Panchu trespassed into Madan's land, and at first tried to divert the drain by cutting a trench across Madan's jute field, and then started to cut the embankment that prevented its discharge into Madan's tank. They had no right to do this and were evidently trespassers. They were also committing mischief on Madan's land. Madan and his brother and three sons came and attacked them. Four of them had lathies but Kala Chand had a spear. Panchu was unarmed and Adel had only a spade. The two trespassers retreated facing their assailants. All five of the accused fell on them and beat them. Kala Chand inflicted ten spear wounds on Adel and five spear wounds on Panchu. Adel also had two lathi wounds on the head, Panchu had one. The two men fell mortally wounded, and the accused then carried them to Madan's house and sent for a doctor and tried to save their lives. Both the men died in Madan's yard that day from the effect of the spear wounds.

On these facts Kala Chand was charged with murder, and all five of the accused were charged under s. 148, and under ss. 304-149 and 326-149. The common object set out in the charge was to cause grievous hurt to Adel and Panchu.

The defence is that Madan alone had an altercation with Adel and Panchu about the cutting of the tank, and Adel and Panchu chased him home with lathies, and trespassed into his house to beat him. Madan (an old man of 60) killed them single handed in self defence. But a more probable statement was made previously that the two men were wounded by Madan's household in defence of Madan in Madan's own house.

Eight witnesses profess to have seen Adel and Panchu being wounded in the jute field, and three others say they saw them being carried from the field to Madan's house. If this evidence is believed, there is no doubt as to the facts of the case, and the only question is what offence was committed in point of law. For my own part I do not believe that any of the alleged eye-witnesses saw what they profess to have seen. But the Jurors believe the evidence, and when the occurrence is proved by eleven eye-witnesses, I cannot venture to assert that the Jury's verdict is wrong in point of fact.

But the verdict of guilty under s. 326 as against Madan, Dabiruddi, Syama Chand, and Suk Chand is quite unsustainable. They were armed only with lathies and the lathi wounds were not grievous. And there were only three lathi wounds. Moreover, there is no charge at all against these

four accused in respect of individual wounds inflicted by them, nor is there any evidence that any one of these four inflicted any particular wound. They can only be found guilty, if at all, by the help of s. 149, Indian Penal Code. But the Jury finds that they are not guilty of rioting. That finding I suppose is based on my direction that if the common object of the assembly was only to eject trespassers from their field, it was not an unlawful assembly. And personally I think that the view is correct, and that the four accused who did not use a spear ought to be acquitted.

But on the Jury's finding of fact these four accused ought to have been convicted under s. 326 read with s. 149. The charge was that the common object of the assembly was not to protect their rights, but to cause grievous hurt. And the Jury has found that the assembly consisted of five men and that all five of them did in fact voluntarily cause grievous hurt, and had no justification at all for doing so. There was therefore no ground at all for convicting all of them under s. 326 and acquitting them under s. 326 read with s. 149.

At any rate the verdict as it stands is both illegal and unwarranted by the evidence. It is, therefore, necessary to refer the case to the High Court. My own opinion is that the common object of the rioters was to exercise their right of ejecting trespassers from their land, that the assembly was not an unlawful one, and that Madan, Dabiruddi, Syama Chand and Suk Chand cannot be held responsible for the individual acts of Kala Chand and should all be acquitted. But if the Jury's finding is accepted that none of the accused had any justification for beating Adel and Panchu and that they all did in fact beat them, I think the finding of guilty under s. 326 as against Madan, Dabiruddi, Syama Chand and Suk Chand should be altered to one under s. 326 read with s. 149.

As to my view of the facts of the case, I can only say that I do not believe that any of the eye-witnesses described what they actually saw. I believe Panchu's dying statement to be true, but it is not clear from that statement that Panchu was wounded at the same time and place as Adel. I am of opinion that Adel alone was in Madan's field cutting the tank and that Panchu was cutting the *Ail* of his own field when Adel was wounded. Panchu must have been wounded in some later occurrence, probably in the courtyard of the accused. Madan and Dabiruddi are both old men. Samchand and Sukchand are young men of about 21.

I have ordered three of the accused to be released on bail, pending the reference, but not Madan."

Mr. K. N. Chaudhuri (with him *Babu Beni Madhab Chatterjee* and *Babu Manindra Nath Banerjee*), for Madan Mandal and others in respect of

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whom a reference under s. 307 had been made. He also represented Kala Chand on whose behalf an application for admission of appeal had been filed.

Mr. Chaudhuri took a preliminary objection that the reference was not in order, as the learned Judge was in agreement with the unanimous verdict of the Jury. It was only in cases of disagreement that reference under s. 307 of the Criminal Procedure Code could be made. The verdict in respect of Madan Mandal and others was a verdict of acquittal, and the learned Judge should have disregarded the verdict of the Jury under s. 326 of the Penal Code inasmuch as there was no charge under s. 326 independently of s. 149 against them. The Jury, therefore, could not return such a verdict: *Reazuddi v. King-Emperor* (1) and *Panchu Das v. Emperor* (2).

The Deputy Legal Remembrancer (Mr. Orr) read the letter of reference and submitted that their lordships had ample power to alter the conviction to one under s. 326 coupled with s. 149 of the Penal Code.

[*Mr. Chaudhuri* was then called upon to address the Court in respect of the application for admission of appeal on behalf of Kala Chand.]

HOLMWOOD AND SHARFUDDIN JJ. This is a reference from the learned additional Sessions Judge of the 24-Perganas and an application for admission of appeal by one Kala Chand Mandal in a case in which the Jury have unanimously found the accused Kala Chand guilty of an offence under section 304 first part of the Indian Penal Code and the Judge has sentenced him to transportation for life, and in the

(1) (1912) 16 C.W.N. 1077.

(2) (1907) I.L.R., 34 Calc. 698.

case of the other four accused persons has referred the verdict of the Jury convicting them under section 326 of the Indian Penal Code to us on the substantial ground that the verdict is illegal inasmuch as the accused were charged under section 304 read with 149 and section 326 read with 149 and the Jury unanimously acquitted them under section 148 and the Judge agrees with that unanimous finding of the Jury.

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In his letter of reference the Judge says that the finding of the Jury was, he supposed, based on his direction that if the common object of the assembly was only to eject trespassers from their field, it was not an unlawful assembly; he thinks that that view is correct and that the four accused who did not use spears ought to be acquitted. But in the end of his letter of reference, he says, that if the Jury's finding is accepted that none of the accused had any justification for beating Adel and Panchu and they all in fact beat them, he thinks that the finding of guilty under section 326 as against Madan, Dabiraddi, Syam Chand and Suk Chand should be altered to one under section 326 read with section 149.

Now, this reference of the learned Judge read with his charge to the Jury has thrown the whole case into a hopeless complication. At the outset the learned Judge was not right in charging the Jury that Adel and Panchu trespassed into Madan's land without explaining to the Jury the distinction between civil trespass and criminal trespass. If, as the learned Judge says, Adel and Panchu went and cut the *bund* for the purpose of saving their own house from flood they could not be held guilty either of criminal trespass or mischief. The learned Judge must know that criminal trespass depends on the intention of the offender and not upon the nature of the act; and when

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the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of his neighbour's property, which he ordinarily would not be justified in doing, he is guilty of any criminal offence. We can have no doubt as the learned Judge has himself said, that the verdict of the Jury acquitting the accused of the charge of rioting was due to this misdirection. But the verdict of the Jury was unanimous and the Judge has agreed with it. Therefore he can make no reference under section 307 with regard to the verdict on the charge of rioting and as a matter of fact he has not done so. Our hands therefore are tied. Upon this reference we cannot consider the question of rioting again, and *a fortiori* we cannot consider any charge made by implication under section 149, so that we are left with this result, as the learned Judge appears to have seen himself, that the verdict of the Jury under section 326 was practically a judgment of acquittal, inasmuch as there being no charge under that section independently there can be no verdict given upon it. If authority is required for that proposition it is to be found in the case of *Reazuddi v. King-Emperor* (1). That decision followed the decision in the case of *Panchu Das v. Emperor* (2) though the proposition laid down in the latter case is the necessary converse and corollary to the proposition laid down in the former. Had the Local Government appealed before us we could of course have dealt with the Judge's misdirection and with any consequent failure in justice which might appear to have occurred. But on a reference under section 307 we are bound to weigh the opinion of the Judge and the Jury, and we have no power to interfere with the unanimous

(1) (1912) 16 C.W.N. 1077.

(2) (1907) I.L.R. 34 Cal. 698.

verdict of the Jury with which the Judge agrees ; and the only verdict with which the Judge disagrees is the verdict which on the face of it is illegal and void and must be set aside. We are unable to see our way to substitute anything for this offence of which the Jury appear to have thought that the four accused might be guilty, because we are precluded now from considering the question of rioting or the question of any separate act of causing hurt with which the accused were never charged.

The result is that upon the reference we must set aside the verdict as against Madan Mandal, Sukchand Mandal, Dabiruddi Mandal and Syam Chand Mandal and direct their acquittal and release.

As regards the case of Kala Chand Mandal (appeal 993 of 1913) we can see no reason whatever for differing from the verdict of the Jury or for modifying the sentence which has been passed upon him by the learned Sessions Judge. Leaving out of account the Judge's erroneous view of the law of trespass the case was one in which the accused might have been convicted of wilful murder as he inflicted no less than 15 spear wounds, ten upon Adel and five upon Panchu and if the view of the learned Judge, that he went after Panchu to another place and deliberately speared him at a different time in a different place, be accepted it would only serve as an aggravation of his offence. We are not therefore inclined to admit his appeal which will accordingly be summarily dismissed.

S. K. B.

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