night of the murder and proceeded together to get the gun from the sixth witness. The prisoners have given no evidence of what they wanted the gun for, and what they did with it—if they did not want it, and did not use it for killing the deceased. This is a strong circumstance against them which they have failed to explain. As to motive, it is shown that the deceased was at enmity with the first prisoner, who was also the person most interested in his death, circumstances going to confirm the truth of his confession that he was desirous of injuring the deceased. The second prisoner had no personal interest in the murder of the deceased, but both he and the first prisoner in their confessions explain how he came to be hired to commit the offence for a pecuniary consideration. We have not overlooked the fact that only one of the two prisoners could have fired the fatal shot, and that which of the two did it cannot be determined upon the mere confessions. But there is no doubt they were both present at the commission of the crime, aiding and abetting each other; consequently both are liable to be convicted for the substantive offence of murder. We therefore agree with the Sessions Judge and confirm the conviction and sentence of both prisoners.

APPELLATE CRIMINAL.

Before Mr. Justice Subramania Ayyar and Mr. Justice Davies.

QUEEN-EMPRESS

v.

DUMA BAIDYA AND OTHERS.*

1896. September 4.

Penal Code, ss. 34, 56, 302—Murder—Sentence of penal servitude.

Where three prisoners assaulted the deceased and gave him a beating, in the course of which one of the prisoners struck the deceased a blow on the head, which resulted in death:

Held, that in the absence of proof that the prisoners had the common intention to inflict injury likely to cause death, they could not be convicted of murder.

The punishment of penal servitude is only applicable to Europeans and Americans.

APPEAL against the conviction and sentence of H. G. Joseph, Sessions Judge of South Canara, in sessions case No. 8 of 1896.

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* Criminal Appeal No. 253 of 1896.

QUEEN-EMPRESS v. DUMA BAIDYA.

In this case the prisoners were charged with having on 10th February 1896 at Mangalore lain in wait for one Koraga (with whom the first accused had a quarrel two days before) and assaulted him. They left him in a state of unconsciousness, from which he never recovered, dying in hospital two days later.

The evidence of two witnesses (prosecution second and third witnesses) who were with the deceased at the time of assault proved that first accused first struck deceased a heavy blow on the head with a bludgeon; that second accused struck him across the chest with a lighter cane; and that when he fell under these blows, third accused put his foot on him and pummelled him.

The medical evidence showed that the cause of death was the blow on the head which fractured the skull and ruptured one of the meningeal arteries.

The Sessions Judge, in finding all three prisoners guilty of murder, remarked as follows:—

"There is no ground for making any distinction between the "three persons concerned in the commission of the offence, and "since the blow struck by the first accused was one which must "have in all human probability smashed the head of the deceased "man, the three must be held to have acted with the knowledge "that death was likely to result from their action."

He therefore convicted the three prisoners and sentenced them to penal servitude for life.

Narayana Rau for appellants.

The *Acting Public Prosecutor* (Mr. *Subramaniam*) for the Crown.

JUDGMENT.—We have no reason to doubt that the three appellants made an attack on the deceased Koraga in the manner described by the first and third prosecution witnesses. The effect of the blow given by the first appellant on the head of the deceased with a thick stick or 'bludgeon' was to cause his death, and we consider the first appellant was rightly convicted of murder. But the conviction of the second and third appellants for the same offence we cannot uphold. There is nothing to show that there was a common intention on the part of all the three accused to inflict such injury as would cause death; and no such intention as regards the second and third accused can be gathered from the particular acts of violence proved against them which in no way

contributed to the death of the deceased. Though the object of all was no doubt to give the deceased a beating, the second and third accused neither instigated nor participated in the fatal blow dealt by the first accused. They cannot, therefore, be held responsible for the consequences of such act, and it is not easy to follow the reasons given by the Judge for holding these two persons also guilty of murder. We therefore alter the conviction of the second and third accused into one of voluntarily causing hurt under section 323 of the Penal Code and convert the sentence passed upon them to one of four months' rigorous imprisonment. The sentence passed by the Judge of 'penal servitude' for life on all the three accused was in itself illegal, as the punishment of 'penal servitude' is applicable only to Europeans and Americans, so that we must also alter the sentence passed on the first prisoner. In lieu of the sentence of the Judge we sentence the first appellant to transportation for life and dismiss his appeal.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Benson.

CHOCKALINGAM PILLAI AND OTHERS (DEFENDANTS 2 to 10, 13 AND 27 to 31), APPELLANTS,

1896. July 23, 24. August 13.

v.

MAYANDI CHETTIAR (PLAINTIFF), RESPONDENT.*

Landlord and tenant—Ulavadai Mirasidars—Permanent tenancy—Lease by temple trustee—Long possession—Necessity for lease presumed—Civil Procedure Code, s. 584—Inference to be drawn from documents, question of law.

In 1813 the manager of a temple gave a permanent lease of one-half of certain lands to C, the ancestor of the defendants 1 to 14, and the other half to N. In 1820 N transferred his half share to V, the son of C. In 1831 V and S, the ancestor of the other defendants, addressed a petition to the Collector, the then manager of the temple. In 1832 V and S executed a fresh lease and a security bond in favour of the temple, in both of which documents V and S were described as Ulavadai mirasidars, that is, persons with an hereditary right to cultivate. There was no evidence adduced to prove for what purpose the lease

* Second Appeal No. 689 of 1895.