accused could have been proceeded against under section 264 of the District Municipalities Act, 1884. The accused was clearly punishable under section 263 if as alleged he erected the fence in the lane without the license required by the law. The circumstance that two out of the seven Magistrates (who constituted the bench that sat during part of the trial) did not attend on the day when the accused was convicted by the five Magistrates who were present then does not affect the legality of the conviction. The cases of *Hardwar Sing* v. *Khega Ojha*(1) and *Damri Thakur* v. *Bhowani Sahoo*(2) are clearly distinguishable inasmuch as in the present case the Magistrates who decided it had attended throughout the trial. We must, therefore, set aside the order of the Deputy Magistrate acquitting the accused and direct the Magistrate to rehear the appeal and dispose of it according to law.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS,

v.

SUBBA NAIK AND OTHERS.*

1898. March 11, 23.

Penal Code—Act XLV of 1860, ss. 302, 304 and 324—Good faith—Order of superior officer—Firing on an unlawful assembly.

A caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and B. Persons having proceeded to reap the crops on behalf of B, the servants of A went to the place with the station-house officer and some constables who were armed. The station-house officer ordered the reapers to leave off reaping and to disperse, but they did not do so; he then told one of the constables to fire, and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The station-house officer, without attempting to make any arrests and without warning the reapers that, if they did not desist from reaping, they would be fired at, gave orders to shoot, and one of the constables fired and mortally wounded one of the reapers. It was found that neither the station-house officer nor the last-mentioned constable believed that it was necessary for the public security to disperse the reapers by firing on them:

(1) I.L.R., 20 Calc., 870. (2) I.L.R., 23 Calc., 194.

* Criminal Revision Case No. 351 of 1897.

QUEEN-EMPRESS v. SUBBA NAIK.

Held, that the station-house officer and the constable were not acting in good faith and that the order to shoot was illegal and did not justify the constable and that both he and the station-house officer were guilty of murder.

PETITION preferred on behalf of Government under Criminal Procedure Code, sections 435 and 439, praying the High Court to revise the sentences passed on the prisoners in Calendar Case No. 47 of 1897 on the file of the Sessions Court of Tinnevelly.

The facts of the case appear sufficiently for the purposes of this report from the following judgment of the High Court.

The Public Prosecutor (Mr. *E. B. Powell*) for the Crown.

Prisoner, No. 1, was not represented.

Vaidinada Ayyar for prisoner No. 2.

Ramakistna Ayyar for prisoner No. 3.

JUDGMENT.—This is a petition presented by the Public Prosecutor on behalf of the Government to revise the sentences passed by the Sessions Judge of Tinnevelly on the three accused on the ground that the sentences are inadequate. The first prisoner was an acting station-house officer, the second prisoner is a constable, and the third prisoner is a private kavalgar. The first and second prisoners were charged with culpable homicide amounting to murder under section 302, Indian Penal Code, but were convicted under section 304 of the Code, the third prisoner was charged with voluntarily causing hurt with a dangerous weapon under section 324, Indian Penal Code, but was convicted under section 323. The first prisoner was sentenced to one year's rigorous imprisonment, the second prisoner to imprisonment until the rising of the Court, and the third prisoner to two months' rigorous imprisonment. The prisoners have not appealed against their conviction.

The facts of the case as found by the Sessions Judge are as follows:—There was a dispute between two co-widows about the enjoyment of a certain field. On the 18th January 1897 the first and third prosecution witnesses (one Sankaralinga Tevan whose death was the subject of enquiry and some coolies) went to the field in question and began to reap the crop on behalf of the junior widow. The Sessions Judge believes that the balance of evidence is that the crop was sown by the senior widow. Soon after the reaping began about midday, three Vellalas of the faction of the senior widow together with the first and second prisoners and another constable, each constable being armed with a gun and accompanied by the kavalgar of the senior widow, appeared on the

scene. The first prisoner ordered the reapers to desist, and the first prosecution witness declined to obey and the point was argued, as the Sessions Judge says, with some acerbity. Finding that the coolies still continued reaping, the first prisoner directed Namasivayam, one of the constables, to fire and he fired in the air. Some of the coolies then ran away, but some remained and assumed a defiant attitude. Then the head constable, first prisoner, again gave orders to shoot, the second prisoner fired and Sankaralingam fell mortally wounded; the third prisoner at the same time attacked third prosecution witness, knocked him down with a stick and stabbed him with some weapon, but the injuries inflicted were not serious. The prosecution witnesses say that the deceased was endeavouring to stop the coolies from running away and that was the reason he was shot by the second prisoner when he was directed to fire. The Police rendered no aid to the wounded man, and when the Village Munsif arrived on the scene all the prisoners had gone away.

The prisoners on their trial at the Sessions set up a defence, which the Sessions Judge considered untrue, and we agree with him.

It was admitted by the prosecution that after the first prisoner had given orders to the coolies to disperse and they had neglected to do so, the assembly became an unlawful one. Assuming that it was so, and that the assembly refused to disperse, it would have been the duty of the Police to arrest the persons who appeared to be the leaders of the assembly, and see what effect that course had upon the remaining coolies, but we do not find that any attempt was made to do this. Nor was any warning given to the coolies that if they did not desist from reaping they would be fired at. It is worthy of remark that no injuries were inflicted on the Police. We have no hesitation in saying that under the circumstances above detailed both the first and second prisoners were guilty of murder. The Government, however, has not appealed against the acquittal on that charge.

We are of opinion that the accused Police officers cannot shield themselves on the plea that they were acting in good faith, for nothing is said to be done in good faith which is done without due care and attention, and we are of opinion that neither the first nor the second accused believed that it was necessary for the public security to disperse such an assembly by firing on them.

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The degree of force which may be lawfully used in the suppression of an unlawful assembly depends on the nature of such assembly, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be obtained. (Lord Bowen's Report on the Colliers' Strike and Riot, —1893.)

The taking of life can only be justified by the necessity for protecting persons or property against various forms of violen- crime, or by the necessity of dispersing a riotous crowd which is dangerous unless dispersed (*Keighly* v. *Bell*(1), *Rex.* v. *Suddis*(2), and *Alexander Broadfoot's case*(3)).

We are of opinion that the second accused is not protected in that he obeyed the orders of his superior officer. The command of the head constable cannot of itself justify his subordinate in firing if the command was illegal, for he and the head constable had the same opportunity of observing what the danger was, and judging what action the necessities of the case required. We are of opinion that the order the second accused obeyed was manifestly illegal, and the second accused must suffer the consequence of his illegal act. The revision petition of the Government, so far as it relates to the enhancement of punishment on the first and second accused, must be allowed, and we sentence R. Subba Naik, the first prisoner, to ten years' rigorous imprisonment, and the second prisoner, Sabjammiah Sahib, to seven years' rigorous imprisonment.

The third accused undoubtedly has received a lenient sentence, but in his case we do not feel ourselves compelled to interfere.

Ordered accordingly.

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(1) 4 F. & F., 763 at p. 790. (2) 1 East., 306 at p. 312.
(3) Foster's Crown Law, 154.