WALLIS AND SANKARAN-NAIR, JJ.

THANDAYUTHAPANI KANGIAR. v. RAGUNATHA KANGIAR.

to follow the decision of this Court in *Subbaraya Mudali* v. *Manika Mudali*(1) and dismiss the second appeal with costs.

SANKARAN-NAIR, J.—I agree and I have only to add that I believe the practice in this Presidency has always been in accordance with the law as laid down in *Subbaraya Mudali* v. *Manika Mudali*(1).

APPELLATE CRIMINAL.

Before Mr. Justice Sundara Ayyar and Mr. Justice Ayling.

GOLLA HANUMAPPA AND OTHERS,

v.

EMPEROR.

1911. April, 24, 25, 28

Penal Code, Act XLV of 1860, s. 149—Existence of common object before commencement of fight not necessary to constitute offence—Criminal Procedure Code, ss. 237, 238, 423 (b)—Appellate Court has power to convict accused of an offence of which he is acquitted in cases not falling under ss. 237, 238.

To constitute an offence under section 149 the existence of a common object before the commencement of the fight in not necessary. It is enough if the common object is adopted by all the accused.

The power of an Appellate Court under section 423 (*b*) of the Criminal Procedure Code to alter the finding while maintaining the sentence is not confined to cases falling under sections 237 and 238 of the Code.

The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under sections 237 and 238 without a distinct charge. In cases not falling under sections 237 and 238, he cannot be convicted of an offence with which he was not charged in the lower Court. Where however he has been charged and the lower Court has recorded a finding on such charge, the Appellate Court can alter the finding.

APPEAL against the conviction and sentence passed upon the appellants by B. C. Smith, Sessions Judge of Bellary Division, in Calendar Case No. 72 of 1910.

The facts for the purpose of this case are sufficiently stated in the judgment.

Dr. *S. Swaminadhan* and *S. Ranganadha Aiyar* for appellant.

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(1) (1896) I.L.R. 19 Mad., 345. * Criminal Appeal No. 22 of 1911.

SUNDARA AYYAR AND AYLING, JJ.

GOLLA HANUMAPPA v. EMPEROR.

The Public Prosecutor for the Crown.

JUDGMENT.—The eight accused in this case were all charged with the offence of rioting under section 148, Indian Penal Code. The second accused was further charged with culpable homicide amounting to murder under section 302; the sixth and fourth accused with causing grievous hurt with a dangerous weapon under section 326. The accused against whom there was no charge of murder or causing grievous hurt as the immediate perpetrators of those offences were, however, charged with the commission of the offences constructively under section 149 of the Code.

The facts of the case are clearly set forth in the judgment of the Sessions Judge and we consider it unnecessary to repeat them. The cause of the rioting was an encounter between prosecution witnesses Nos. 1, 3 and 4 and probably also 5 on the one side and one Narasakka, the mother of accused Nos. 6 to 8 on the other side. A case of abduction of one Narasamma against accused Nos. 2, 3 and 6 initiated by the prosecution fifth witness, her husband, was pending at the time of the encounter. One Narasappa according to the prosecution was helping the prosecution fifth witness in the abduction case. The prosecution witnesses referred to above were going from their village for sowing their fields on the morning of the day of the offence. The encounter with Narasakka took place just outside the village. Abusive words and a quarrel ensued between the prosecution party and Narasakka. According to the prosecution all the eight accused went up to the place where the quarrel was going on. A fight ensued between them and the prosecution party in which very serious injuries were inflicted on Narasanna who died in consequence. Prosecution witnesses Nos. 3 and 4 also sustained serious injuries and prosecution first witness was also injured. Some of the accused also received some injuries. The lower Court acquitted all the accused of murder. It also acquitted them of rioting holding that "what happened was a sudden fight," that is to say, apparently, that it was not proved that the accused acted in pursuance of a common object and were therefore not members of an unlawful assembly. But the Judge found that the evidence established that all the accused were guilty of causing hurt and accused Nos. 2 and 6 of causing grievous hurt. His judgment does not show what injuries each of the accused inflicted and on which of the prosecution witnesses, except with respect to the sixth accused. According

to him it is not certain who dealt the fatal blow which killed Narasanna. He proceeds "Though it is not certain that the second accused dealt the fatal blow, he certainly took a leading part in the fight. I think there is no reasonable doubt too that the sixth accused was particularly active and that he caused grievous hurt to prosecution third witness." He convicted all the accused under section 325, Indian Penal Code, and the second and the sixth accused under section 326, Indian Penal Code, also. Accused Nos. 1 to 3, 4 and 6 have preferred this appeal.

The evidence as to the details of the fight and as to the accused who inflicted the fatal blow on the deceased Narasanna or caused grievous hurt to prosecution witness No. 3 is extremely discrepant and some of the witnesses for the prosecution gave different accounts on different occasions before the trial of the case in the Sessions Court. We are unable to confirm the Sessions Judge's finding that it was the sixth accused that caused grievous hurt to the third accused. Nor are we able to decide on the evidence whose act caused the death of Narasanna. We are, however, of opinion, differing from the Sessions Judge, that the evidence is sufficient to prove that all the accused were members of an unlawful assembly and were guilty of rioting and that they were all responsible for the injuries inflicted on several prosecution witnesses in the course of the fight. The cause of the quarrel as already mentioned was the deceased Narasanna's helping the prosecution fifth witness in the abduction case and acting against accused Nos. 6, 2 and 3 who were the accused in that case. All the accused espoused their cause and joined in the quarrel. We are quite unable to accept the argument of the learned counsel for the appellants that the existence of a common object before the fight began is necessary to justify the conviction of the accused of rioting. It is quite enough that accused Nos. 1, 3, 4, 5, 7 and 8 adopted the common object of accused Nos. 2, 3 and 6 to cause hurt to the prosecution party for helping Narasanna. It is also immaterial that the idea of injuring them was conceived suddenly after the accused went to the scene of offence where Narasakka had already encountered the prosecution party. We agree with Sessions Judge that the accused Nos. 1 to 3 and 6 are proved to have been present and to have taken part in the fight. We also agree that the second and sixth accused took the most prominent part in it.

SUNDARA AYYAR AND AYLING, JJ.

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With the regard to the fourth accused, he pleaded *alibi* and examined two witnesses, defence witnesses Nos. 12 and 13 and produced exhibit X to prove his plea. This is a document purporting to have been executed by the fourth accused in twelfth witness's favour for Rs. 26, the balance of consideration due from him to the witness for the purchase of a bull on the date of the offence. The witness swears that the document was executed on the date it bears. He is apparently a respectable witness paying an annual assessment of Rs. 300. Defence thirteenth witness is the stamp vendor who sold the stamp on which exhibit X was executed on the date previous to the offence. The fourth accused is a brother of the fifth accused whose presence at the quarrel we find to be proved and it is possible that he was falsely included in the charge owing to his relationship to some of the accused. Having regard to the conflict of evidence as to the presence of the fourth accused we think there is reasonable doubt regarding his complicity in the occurrence and he is therefore entitled to be acquitted.

Dr. Swaminadhan contends that it is not competent to us to convict the accused of being members of an unlawful assembly or rioting or to hold them constructively guilty of the offences of causing hurt and grievous hurt as they were acquitted of those offences by the lower Court. But in our opinion this contention is not sound. Under section 423, clause (*b*) of the Code of Criminal Procedure, an Appellate Court has the power to alter the finding of the lower Court maintaining the sentence. It is urged that this provision entitles the Court to convict an accused of an offence of which he is acquitted only in cases falling under sections 237 and 238 of the Code of Criminal Procedure. We see no reason to adopt this qualification of the plain words of section 423. Sections 237 and 238 of the Code of Criminal Procedure provide that in the cases to which they apply an accused person may be convicted of an offence with which he is not charged. The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused was apparently charged in the lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under sections 237 and 238 of the Code of Criminal Procedure no doubt the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court but where he has been charged and the first Court has recorded a finding on the charge

there is no reason for holding that the Appellate Court cannot alter the finding. There is obviously no injustice in doing so. Our view is in accordance with the opinion of the Calcutta High Court in *Satis Chandra Das Bose* v. *Queen-Empress*(1) and *Queen Empress* v. *Jabanulla*(2). In the result we acquit the fourth accused and direct that he be discharged and set at liberty. We alter the conviction of the other appellants by finding them guilty of offences under section 147 and under section 325 and 326 read with section 149 of the Penal Code and confirm the sentences.

ORIGINAL CRIMINAL.

Before Sir Arnold White, Chief Justice, Mr. Justice Sankaran-Nair and Mr. Justice Ayling.

KING-EMPEROR

v.

NILAKANTA AND THIRTEEN OTHERS, ACCUSED.*

1911. September 11 to 1912. Feb. 2, 15

Indian Evidence Act (I of 1872), ss. 25, 114, illustration (b), 133, 157—Criminal Procedure Code, Act V of 1898, ss. 154, 155, 157, 162 and 551—Approvers' evidence, corroboration of—Admissibility of previous statements of approvers to Police Inspector—Value of such statements as corroboration—"Legally competent to investigate," meaning of—Competency of officer of Criminal Investigation Department.

SIR ARNOLD WHITE, C.J., and AYLING, J.—It is not the law either of England or India that the evidence of an accomplice must be corroborated id material particulars before it can be acted upon. Where a court is judge of fact as well as of law the court as a judge of fact is not precluded from considering the question whether the unsupported evidence of an accomplice is true or not. A court may be warranted in declining to draw the presumption of fact referred to in illustration (*b*) to section 114, Indian Evidence Act (I of 1872). Section 133, Indian Evidence Act, is the substantive enactment declaring the law whereas section 114 only lays down certain propositions intended to assist the courts in drawing inferences of fact.

Where the court is acting in the capacity of both judge and jury it must direct itself and the proper direction would be:—Consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in

(1) (1909) I. L. R., 27 Calc., 172. (2) (1896) I. L. R., 23 Calc., 975.

* Special Bench Case No. 1 of 1911.