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clearly contemplates *pending* appeals, and not appeals already determined and disposed of."

In the present case we have been assured by my brother Brodhurst that the judgments which he and Petheram, C. J., recorded were delivered from the Bench as judgments of the Court, and this being so, consistently with the views which I expressed in the case already cited, those learned Judges ceased to be possessed of the case, and could, therefore, make no reference under s. 575 of the Civil Procedure Code. Indeed, under the provisions of that section, the decree made by my brother Brodhurst prevailed, and the order which referred the case to us was, therefore, *ultra vires*, and the proper remedy open to the appellant was to have preferred an appeal under s. 10 of the Letters Patent. The remedy may still be open to him, but I express no opinion as to how far such a remedy will be affected by the question of limitation.

APPELLATE CRIMINAL.

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May 16.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

QUEEN-EMPRESS *v.* BISHESHAR AND OTHERS.

Rioting—Grievous hurt committed in the course of riot and in prosecution of the common object—Distinct offences—Separate sentences—Act XLV of 1860 *(Penal Code), ss.* 71, 147, 149, 325—*Act VIII of* 1882, *s.* 4—*Criminal Procedure Code, s.* 235.

S. 149 of the Penal Code creates no offence, but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hand commit the offence committed in prosecution of the common object of the unlawful assembly or such as the members of the assembly knew to be likely to be committed in prosecution of that object.

In prosecution of the common object of an unlawful assembly, *M*, with his own hand, caused grievous hurt. *M* and other members of the assembly, as to whom it did not appear whether or not any of them personally used force or violence, were convicted of rioting under s. 147 and grievous hurt under s. 325 of the Penal Code, and were each sentenced to separate terms of imprisonment for each offence. The highest aggregate punishment which was *M's*, was six years' rigorous imprisonment, being one year for rioting and five years for causing grievous hurt.

Held that, assuming s. 71 of the Penal Code to be applicable, the sentences were not illegal, as the combined periods of imprisonment did not in the case of any prisoner, exceed the maximum punishment of seven years' rigorous imprisonment which could have been awarded for the offence punishable under s. 325.

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Held also that the riot could not, in any of the cases, be considered a part of the offence under s. 325, that s. 71 did not apply, and that the sentences were legal.

Queen-Empress v. *Ram Partáb* (1) dissented from. *Queen-Empress* v. *Dungar Singh* (2), *Queen-Empress* v. *Ram Sarup* (3), *Queen* v. *Rubbee-oollah* (4), *Lole Nath Sarkar* v. *Queen-Empress* (5), *Queen-Empress* v. *Pershad* (6), *Chandra Kant Bhattacharjee* v. *Queen-Empress* (7), and *Reg.* v. *Tukaya bin Tamana* (8) referred to.

The facts of this case are sufficiently stated in the judgment of Edge, C. J.

Mr. *C. Ross Alston*, for the appellants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

EDGE, C. J.—The appellants in this case were, on the 22nd January last, convicted by the Sessions Judge of Gorakhpur, under s. 147 of the Indian Penal Code, of a riot, and, under s. 325 of the same Code, of voluntarily causing grievous hurt to Mr. Turner.

Harnath Pande was sentenced to two years' imprisonment for the riot and to three years for causing grievous hurt. Mangan was sentenced to one year's imprisonment for the riot and to five years for causing grievous hurt. The Judge directed that in each case the sentence for causing grievous hurt should commence on the expiration of the sentence for the riot.

It was not contended by Mr. *Alston*, who appeared for the appellants, that a riot had not in fact taken place. But it was contended by him as to Dubri, Bisheshar, Lalsa, Sarju, Amir Khan, and Mathura, that they were not present, and were not parties to the riot or to the inflicting of the grievous hurt upon Mr. Turner. It was contended by Mr. *Alston*, as to all the appellants, that by reason of s. 71 of the Indian Penal Code, as amended by s. 4 of Act VIII of 1882, the sentences were in each case illegal. In support of this contention Mr. *Alston* relied upon the judgment of Mr. Justice Straight in the case of *Queen-Empress* v. *Ram Partab* (1). Mr. *Alston* also contended that in any event the sentences in each case were too severe. Owing to the respect we entertain for the opinion of Mr. Justice Straight, we took time to consider our judgment. The riot, in the course of which Mr. Turner was seriously injured,

(1) I. L. R., 6 All. 121.
(2) I. L. R., 7 All. 29.
(3) I. L. R., 7 All. 767.
(4) 7 W. R. Cr. 13.
(5) I. L. R., 11 Calc. 349.
(6) I. L. R., 7 All. 414.
(7) I. L. R., 12 Calc. 493
(8) I. L. R., 1 Bom. 214

took place on the 26th of October, 1886. It appears that Mr. Turner had previously been in the employment of Sant Bakhsh Singh, and had, in the course of his employment, collected rents for him. Prior to the 26th of October, 1886, Mr. Turner had transferred his services to Nath Bakhsh Singh, a brother of Sant Bakhsh Singh, and on the occasion in question had gone to Chota Bishenpura, as the agent of Nath Bakhsh Singh, to collect rents from the villagers, who appear to have been the tenants of Sant Bakhsh Singh and Nath Bakhsh Singh. Whilst Mr. Turner was endeavouring to collect the rents for his employer, Nath Bakhsh Singh, a large body of men armed with *lathis*, at whose head was the appellant Harnath Pande on horseback, came to the village. Harnath Pande was the karinda of Sant Bakhsh Singh. Harnath Pande ordered Nath Bakhsh Singh to move away, saying, "Sant Bakhsh Singh's orders are to beat the Sahib, not you or your men." Harnath Pande's party surrounded Mr. Turner, and the appellant Mangan and others struck Mr. Turner with their *lathis* on the head and body and thereby caused him grievous hurt. Mr. Turner ultimately succeeded in escaping with his life. It does not appear whether or not any of the other appellants actually struck Mr. Turner. I have no doubt that each of the appellants was a party to, and participated in, the riot. Each of them is, in my judgment, fully identified, and as to the *alibis* which were called for Dubri, Bisheshar, Lalsa, Sarju, Amir Khan and Mathura, I consider them to have been worthless. In my opinion it was also clearly established that Mangan committed an offence under s. 325 of the Indian Penal Code by voluntarily causing grievous hurt to Mr. Turner, and that each of the other appellants is as responsible for the committing of that offence as if it had been committed by his own hand. The common objects of that unlawful assembly were, in my opinion, to compel Mr. Turner to refrain from collecting the rents for his employer, and to use violence to him. These objects were effected. That the appellants could legally be tried for and convicted of the offences under ss. 147 and 325 is not questioned, nor can there be any doubt on the point. That the appellants were properly convicted, and that the sentences passed in each case were not too severe, I have equally no doubt. My only doubt on this point of the amount of the sentences is whether Harnath Pande ought not

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to have received a more severe sentence than that passed upon him.

The question then remains, whether or not the sentences were legal. This depends on the true construction of s. 71 of the Indian Penal Code as amended by s. 4 of Act VIII of 1882, and upon the construction of ss. 149 and 325 of the same Code.

A person convicted under s. 325 of voluntarily causing grievous hurt may be punished with imprisonment of either description for a term which may extend to seven years. In none of the cases before us did the combined sentences exceed the term of imprisonment which the Judge might have awarded in each case for the offence under s. 325.

S. 71 as amended is as follows:—"When anything which is an offence, is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences unless it be so expressly provided.

"When anything is an offence falling within two or more definitions of any law in force for the time being by which offences are defined or punished, or when several acts, of which one or more would by itself or themselves constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

If the second and third paragraphs of s. 71 as amended are the only portions of the section which apply in this case, it is clear that none of the appellants has been punished "with a more severe punishment" than the Court which tried him could have awarded for the offence under s. 325. Mangan's punishment was six years' imprisonment, made up of two sentences of five years and one year. The Judge could have awarded him seven years for the offence under s. 325.

Throughout s. 71 the word "punishment" and not the word "sentence" is used and, I assume, with an object. If the earlier part of s. 71, that is, the section as it stood before it was amended, applies to this case, the answer is that none of the appellants has been punished with the punishment of more than one of his offen-

ces; that is to say, the combined periods of imprisonment do not in any of the cases exceed the maximum punishment which could have been awarded for the offence under s. 325. If it were intended by the Legislature that in cases coming within s. 71 as amended, a prisoner should be sentenced to punishment for one offence only, it would have been easy for the Legislature to have said so, and the section would then have not only the effect which I think it has, but also the effect which it was contended by *Mr. Alston* that it has.

If Mr. *Alston's* contention be well founded, I confess I do not see any adequate reason for the insertion of s. 235 in the Code of Criminal Procedure, 1882, nor of the illustrations to that section. There would be little use in inquiring into and convicting an accused person of two offences if he could be legally sentenced for one only. In my opinion, which I express with diffidence, knowing that it is opposed to that of one of the most accomplished criminal lawyers on the Indian Bench—I refer to Mr. Justice Straight—s. 71 as amended does not apply to a case of this kind at all. Whether or not s. 71 as amended applies to this case, must depend upon the construction of s. 149 of the Indian Penal Code. Unless s. 149 creates an offence, it is obvious that s. 71 does not apply.

S. 149 appears to me to create no offence, but to be, like s. 34 of the same Code, merely declaratory of a principle of the common law, which at any rate in England has prevailed. In the present case no doubt, in order to convict the appellants, other than Mangan, of the offence under s. 325, it was necessary for the prosecution to give such evidence as entitled the Judge to find that there was an unlawful assembly; that some member of that unlawful assembly had voluntarily inflicted grievous hurt, within the meaning of s. 325, upon Mr. Turner, and that the offence was committed by such member of the unlawful assembly in prosecution of the common object of that assembly, or was such as the members of that assembly knew to be likely to be committed in prosecution of that object, and that the accused were, at the time of the committing of that offence, members of the same assembly. When such facts were established, the commission of an offence under s. 325 was proved against the accused. It is true that one step in the proof was

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the evidence that the accused, at the time of the committing of the offence under s. 325, were members of an unlawful assembly. The offence under s. 325 is one, except as therein provided, of voluntarily causing grievous hurt, and not of voluntarily causing grievous hurt whilst the accused is a member of an unlawful assembly. The object of s. 149, as I think, in such a case as the present is to make it clear that an accused who comes within that section, cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. Take the case of Mangan, whose hand did, in fact, inflict grievous hurt upon Mr. Turner. In his case he was a member of the same unlawful assembly, and the offence committed by him was committed in the prosecution of the common object of that assembly, and was such as he and the other appellants knew to be likely to be committed in prosecution of that object. According to the judgment of the majority of this Court in the case of the *Queen-Empress* v. *Ram Sarup* (1) if their judgment applies at all, Mangan could be legally sentenced to imprisonment for the riot and to imprisonment for inflicting grievous hurt on Mr. Turner. My reason for raising a doubt as to whether the judgment of the majority of the Court in that case applies is, that it does not clearly appear from the referring order, or from the judgment of the majority of the Court, that the case had to be regarded by the Court, or was in fact regarded by the majority as one in which it was proved that the grievous hurt had been caused in the prosecution of the common object of the unlawful assembly, or that the offence of causing grievous hurt was known by the members of that assembly to be likely to be committed in the prosecution of the common object. Nevertheless, if that case was not referred on the basis that the Court should assume that the grievous hurt was caused in the prosecution of the common object of an unlawful assembly, it is difficult to see why the case was referred at all; and certainly my brother Brodhurst in his judgment in that case appears to have dealt with the reference on that basis.

If five people, *A*, *B*, *C*, *D* and *E*, go out with the common object and intention of doing that which would constitute a riot, and of causing in the course of the riot grievous hurt to a particular person, and carry this intention into effect, but by chance

(1) I. L. R., 7 All. 757.

the grievous hurt is inflicted upon the particular person by the hands of one only of the five rioters—let me say by the hands of *A*—I fail to see upon what principle of law or common sense *A* should be liable to be sentenced for the riot, and also for causing the grievous hurt, whilst his equally guilty companions should be liable to be sentenced for one only of those offences. It may be said on the authority of the decision in the case of *Queen* v. *Rubbee-bollah* (1) that, in the case I have just put, *A* could not have been punished for the riot and also for causing grievous hurt. A passage in the judgment of Tottenham and Ghose, JJ., in the case of *Loke Nath Sarkar* v. *Queen-Empress* (2), would appear also to be an authority for that contention. The passage to which I refer is as follows :—"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoner could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding, for rioting was being committed before the hurts were inflicted." If this be a correct view of the law, *A*, whose act of causing grievous hurt constituted in that event the offence of rioting, could not be punished for the riot and for the grievous hurt, but his companions *B*, *C*, *D*, and *E*, who subsequently in the course of the riot and in the prosecution of the common object of the same unlawful assembly, by their own hands voluntarily caused grievous hurt to another person, might be punished for the same riot and for the grievous hurt caused by them. In other words, the person whose act converted what was an offence under s. 143 into the offence of rioting under s. 146, and whose hand it was that inflicted the first blow, would be liable to be sentenced for one offence only, whilst his not more guilty companions would be liable to be punished for two offences, although all of the offences were committed in prosecution of the common object of the unlawful assembly, and were such as the members of that assembly knew to be likely to be committed in prosecution of that object. If it be said that in such a case *A* might be sentenced for the riot, and also for the grievous hurt caused by *B*, *C*, *D*, and *E*, the answer is that that is to suppose that the latter offence was not a component part of the offence

(1) 7 W. R. Cr. 13. (2) I. L. R., 11 Calc. 349, at p. 353.

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of the rioting, and that nothing but the first act of force or violence, *plus* the unlawful assembly, constituted the riot. In that event I should like to ask how long the riot continued, and whether each subsequent act of force or violence constituted a fresh offence of rioting, and if it did, whether *A*, *B*, *C*, *D* and *E* could, under such circumstances, be punished for more than one offence of rioting, or for the riot completed by the grievous hurt caused by *A*, and for the offence under s. 325 committed by *B*, *C*, *D* and *E*, in prosecution of the common object of the same unlawful assembly, which by itself, *plus* the unlawful assembly, would have been sufficient to constitute a riot. In my humble opinion, the violence of *A* and that of *B*, *C*, *D* and *E* were component parts of one and the same riot. It might be contended that, although *A*, *B*, *C*, *D* and *E* could not in a case like the present be sentenced for rioting and also for causing grievous hurt, they might each, or any of them, be sentenced for having been members of an unlawful assembly and also for the causing of the grievous hurt. Such sentences would, in the present case, be based upon findings inconsistent with each other and with the facts, and inconsistent also, as I think, with the law, unless the Judge were entitled to split up the transaction and find the appellants guilty of the offence of having been members of an unlawful assembly up to 9 o'clock in the morning, when the offence of unlawful assembly merged by the violence into that of riot. In such a case, would it have been competent for the Judge to have sentenced the appellants for having been members of an unlawful assembly and also for the riot? A component part of the riot was the same unlawful assembly, and if s. 149 does create an offence, the same unlawful assembly was a component part of the offence of grievous hurt, so far as *B*, *C*, *D* and *E* are concerned, and in the case of *A*, —Mangan—the evidence showed that he had caused the grievous hurt whilst he was a member of the unlawful assembly and in the prosecution of the common object of that assembly. As I have said, s. 149 does not, in my opinion, create an offence: it is merely declaratory of the law, and I should think the Courts in India would so have interpreted the law, even if s. 149 had not been in the Code. The section which relates to dacoity with murder—s. 396 of the Indian Penal Code—is, I think, an example of a section

which does create a substantive and distinct offence. The difference in principle between s. 149 and s. 396 is apparent. Under s. 396, all persons who are conjointly committing dacoity are equally responsible, whether the murder was or was not committed in the prosecution of the common object, and even if they did not, in fact, know that it was likely that murder would be committed in the committing of the dacoity.

It appears to me that in the case of the other appellants the riot was no more part of the offence under s. 325 than it was in the case of Mangan. To take an illustration from the law in England. If these appellants had been convicted in England of, and sentenced for, the offence of unlawful wounding under circumstances similar to those in the present case, and were subsequently indicted for the riot, no one would, I think, suggest that they could plead the previous conviction as a bar, and for the reason that the offences were not the same, and they could not have been convicted of the riot on the indictment which charged them with the unlawful wounding. If they could not plead the previous conviction as a bar, they would be liable to be convicted and sentenced for the riot, although they had been previously convicted and sentenced for the unlawful wounding. But no doubt the previous sentence would be taken into account.

To constitute a riot according to the law in England, there must be an assembly together of three or more persons, and their assembling must be accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are calculated to inspire people with terror. It is sufficient if any one of the Queen's subjects be in fact terrified. (Archbold's *Pleading and Evidence in Criminal Cases*, 20th ed., page 956.) As illustrating the law of England on this point, I may quote the following passage from Archbold's *Pleading and Evidence in Criminal Cases*, 20th ed., page 148 :—

"An acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for larceny of the same goods, because upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary with intent to commit a larceny, and did not charge an

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actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny—2 Hale, 245, R. v. *Vandercomb* (1), because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter—Fost. 392; 2 Hale, 246—because the defendant might be convicted of manslaughter upon the first indictment. So an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder—Fost. 229; 3 Co. 466; *Holcroft's* case (2); 1 Stark. 305; *R.* v. *Tancock* (3). So now also a person cannot, after being acquitted on an indictment for felony, be indicted for an attempt to commit it, for he might have been convicted for the attempt on the previous indictment for the felony—14 and 15 Vic., c. 100, s. 9. So also a person indicted and acquitted on an indictment for robbery cannot afterwards be indicted for an assault with intent to commit it—ss. 24 and 25 Vic., c. 96, s. 41; a person indicted and acquitted for a misdemeanor, which upon the trial appears to be a felony, cannot afterwards be indicted for the felony—14 and 15 Vic., c. 100, s. 12; a person indicted and acquitted for embezzlement, cannot afterwards be indicted as for a larceny, or, if tried and acquitted for a larceny, cannot afterwards be indicted as for embezzlement upon evidence of the same facts—24 and 25 Vic., c. 96, s. 72; *R.* v. *Gorbutt* (4)."

S. 71 would, in my opinion, apply, for instance, to a case in which a man in committing a theft voluntarily caused hurt to any person. In that case one component part of the offence of the robbery would be the offence of the theft.

The judgment of my brother Brodhurst in the case of *Queen-Empress* v. *Dungar Singh* (5); his judgment in the case of *Queen-Empress* v. *Ram Sarup* (6); the judgments of Oldfield, Brodhurst, Duthoit and Mahmood, JJ., in the case of *Queen-Empress* v. *Pershad* (7), and the judgment of Mitter and Beverley, JJ., in *Chandra Kant Bhattacharjee* v. *Queen-Empress* (8), support the view that in such a case as this a sentence for riot and a sentence for voluntarily causing grievous hurt can be legally

(1) 2 Leach, 716.
(2) 2 Hale, 246.
(3) 13 Cox, 217.
(4) Dears. and B, 166; 26 L. J. M. C. 47.
(5) I. L. R., 7 All. 29.
(6) I. L. R., 7 All. 757.
(7) I. L. R., 7 All. 414.
(8) I. L. R., 12 Calc. 423.

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passed. The judgment in the case of *Reg.* v. *Tukaya bin Tamana* (1) has a bearing on this point.

I am of opinion that the sentences in this case were legal, and that these appeals should be dismissed.

BRODHURST, J.—The facts and the law applicable to the case have been fully stated by the learned Chief Justice, and I have, on previous occasions, expressed my own views on the legal points that have again arisen. Under these circumstances, it is, I think, sufficient for me to observe that the convictions are supported by the evidence for the prosecution; that the sentences that have been passed are, in my opinion, undoubtedly legal; that I see no sufficient reason for interference either with the convictions or the sentences, and that I therefore concur in dismissing the appeals.

Appeals dismissed.

APPELLATE CIVIL.

1887
May 20.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Brodhurst.

HUSAINI BEGAM (PLAINTIFF) *v.* THE COLLECTOR OF MUZAFFARNAGAR AND OTHERS (DEFENDANTS). *

Limitation—Appeal—Admission after time—Act XV of 1877 *(Limitation Act), s.* 5—"*Sufficient cause*"—*Poverty—Pardah-nashin—Letters Patent, N. W. P., s.* 10—"*Judgment*"

On the 14th February, 1881, the High Court dismissed an application of the 22nd March, 1883, by a *pardah-nashin* lady, for leave to appeal *in formâ pauperis* from a decree dated the 16th September, 1882, the application, after giving credit for 86 days spent in obtaining the necessary papers, being out of time by 73 days. On the 16th August, 1884, an order was passed allowing an application which had been made for review of the previous order to stand over, pending the decision of a connected case. On the 24th April, 1885, the connected case having then been decided, the application for review was heard and dismissed. Nothing more was done by the appellant until the 18th June, 1885, when, on her application, an order was passed by a single Judge allowing her, under s. 5 of the Limitation Act (XV of 1887) to file an appeal on full stamp paper, and she thereupon, having borrowed money on onerous conditions to defray the necessary institution fees, presented her appeal, which was admitted provisionally by a single Judge.

* Appeal No. 3 of 1886 under s. 10 of the Letters Patent.

(1) I. L. R., 1 Bom, 214.