

1895.
January 11.

APPELLATE CRIMINAL.

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

QUEEN-EMPRESS v. TEJA AND OTHERS.

Act No. XLV of 1860 (Indian Penal Code) s. 396.—Dacoity in the course of which murder is committed—Facts necessary to establish the offence provided for in s. 396.

When in the commission of a dacoity a murder is committed it matters not whether the particular dacoit charged under s. 396 of Act No. XLV of 1860 was inside the house where the dacoity is committed or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. *Queen-Empress v. Umrao Singh* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Neither the appellants nor the Crown were represented.

EDGE, C. J. and BANERJI, J.—Teja and Zaharia have appealed against sentences of death passed upon them for the offence of dacoity with murder, under s. 396 of the Indian Penal Code. It is clearly proved that on the 29th of April 1892, a dacoity was committed at the village of Hath Kant, in the commission of which dacoity a villager named Janki Prasad was shot dead by one of the dacoits. There is evidence showing that the person who fired the shot was Zaharia. Janki Prasad and the dacoits who actually killed him were outside the house. At the time Teja was inside the house, plundering it. The evidence leaves no doubt that these two men were members of the gang of dacoits engaged actually in that dacoity. As to Zaharia there can be no question that he has brought himself within s. 396 of the Indian Penal Code. But as to Teja it is necessary to consider whether the fact that the murder was committed outside the house at a time when he was inside the house takes his case out of s. 396. In the case of *Queen-Empress v. Umrao Singh*, (1) a Bench of this Court said in its judgment:—“We are also of opinion that to establish a liability to the punishment provided in this section (s. 396) it is necessary to prove that the person said to be liable was one of the persons

(1) I. L. R. 16 All. 437.

who were conjointly committing dacoity, and was present when the act of murder in the dacoity was committed." Further on it was said :—" There is room for such doubt, particularly in the case of Girwar Singh and Raghubar Singh, for there is no evidence which places them within the house of Hira Lal at the time when the murder was committed."

If those two statements to which we have referred are to be taken as of general application, we entirely dissent from their correctness as statements of law. It is probable that in that particular case in which that judgment was delivered Girwar Singh and Raghubar Singh were not proved to have been conjointly with the others committing dacoity. However, on that we need express no opinion. In our opinion it matters not, when in the commission of a dacoity a murder is committed, whether the particular dacoit charged under s. 396 was inside the house or outside the house, or whether the murder was committed inside or outside the house, so long only as the murder was committed in the commission of that dacoity. In our opinion these two men were properly convicted of the offence punishable under s. 396 of the Indian Penal Code. We dismiss their appeals, and, confirming the convictions and sentences, we direct that those sentences be carried into effect.

1895

QUEEN-
EMPERESS
v.
TEJA

APPELLATE CIVIL.

1895.
January 10.

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

KUAR SEN (PLAINTIFF) v. MAMMAN AND OTHERS (DEFENDANTS).*

Easement—Customary right—Facts necessary to establish the existence of a customary right.

The plaintiff sued for possession of a piece of land which, he alleged, formed part of the court-yard of his *kothi*, and for demolition of a *chabutra* thereon. The defendants denied the plaintiff's title and alleged that they always used the *chabutra* as a sitting place, and that during the *Moharram* the *tazias* and *alums* were exhibited upon the *chabutra* and a *takht* was placed upon it. The Court of first instance found that the defendants had a right to use the land in the manner claimed during the

* Letters Pa

peal No. 1 of 1894.