APPELLATE CRIMINAL.

1898
June 13.

Before Sir Louis Kershaw, Kt. Chief Justice and Mr. Justice Knox.

QUEEN-EMPRESS *v.* PRAG DAT AND OTHERS.*

Criminal Procedure Code (1882) *section* 417—*Appeal by Government from an acquittal on the same footing as an appeal from a conviction—Act No. XLV of* 1860, *sections* 96 *et seqq—Right of private defence.*

When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises.

In the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and a right of appeal against a conviction. *Empress* v. *Gayadin* (1), and *Queen-Empress* v. *Gobardhan* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Officiating Government Advocate (Mr. *A. E. Ryves*), with whom Messrs *C. Dillon* and *B. E. O'Conor*, for the Crown.

Mr. *W. Wallach* and Babu *Jogindro Nath Chaudhri* for the respondents.

KERSHAW, C. J., and KNOX, J.—This is an appeal presented by the Government Advocate from an original order of acquittal passed by the Sessions Court of Farrukhabad. That Court had before it six Chaube Brahmans, all relatives, and a Gadaraya, the servant of the Brahmans, charged with offences under sections 148 and 302 of the Indian Penal Code, committed at Madhonagar on the 23rd of July 1897.

There can be no room for doubt that the case is one of conflict between the Thakurs and Chaube Brahmans of Madhonagar. They are at dispute over a strip of waste land. The Chaubes assert that the land appertains to a grove which is admitted to belong to them. The Thakurs, on the other hand, maintain that the disputed land is part of their cultivation, which as a fact does adjoin it.

* Criminal Appeal No. 323 of 1898.

(1) I. L. R., 4 All., 148. (2) I. L. R., 9 All., 528.

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On the 23rd of July the dispute between the parties resulted in a fight, and in this fight one Ajudhia, a servant of the Thakurs, was shot dead. Laltu, the Gadaraya, is charged with having fired the gun. The prosecution says that he fired in pursuance of the common object of the Brahmans, who were attempting by show of force to enforce their alleged rights over this strip of land. Hence the charge laid under the sections above quoted against all the seven respondents. Both the Thakurs and the Brahmans have been arrested on account of this disturbance.

As usual in cases of this kind the police have found it difficult to secure independent testimony of what did take place. Those of the villagers who were present and looking on would probably by sympathy and bias be so attached to one or other of the disputing parties that it would be hopeless to get disinterested and reliable evidence from them. Three witnesses have been found, a barber and a weaver of Bhawan Sarai, and a carpenter of Akramabad, both of them villages within a mile's distance from Madhonagar. It is not suggested by the defence that any one of these three is suspected of bias or partisanship. It is upon their evidence that the Sessions Court acquitted the Brahmans, and it is upon their evidance that the Government Advocate asks us to convict the Brahmans.

We have examined this evidence most minutely, and have been assisted in doing so by careful criticisms on the part of the Government Advocate and the learned counsel who appears for the accused. Undoubtedly these statements differ in points of detail, but they all agree on the following facts:—That the Thakur party consisted of from thirty to fifty men, and that one of that party had a gun and the rest were armed with lathis; that on the other side were arrayed the seven accused; one of them, Laltu, carried a gun; the others had nothing in their hands except that, according to Chedda and Buddha, they carried sticks. All agree in saying that the Thakurs gave orders for the demolition of a *thaonla*, or mud wall, probably three feet high, round a neem tree; that upon this the Chaubes interfered and begged that the matter be referred

to Court. Words ensued, then blows, and almost immediately Laltu fired at Ajudhia on the Thakur's side and shot him dead on the spot. Upon this all are said to have run away. The defence put forward on behalf of two of the accused is an *alibi*. The others say that they went to the assistance of Ganga Bakhsh; that they were beaten; that they had no weapons of any kind, and beat no one. Ganga Bakhsh says he was on the spot gathering flowers; found the Thakurs intent upon demolishing the *thaonla*; remonstrated, and was beaten and became unconscious. Laltu says he carried no gun on that day.

The contention of Mr. *Wallach*, who appeared for the defence, is that upon the evidence of these very three witnesses it is established that the Chaubes were on the spot for a lawful purpose; that they continued throughout a lawful assembly; that Laltu did not come on the spot with them, but after them and quite independently. Laltu had been out shooting birds, and his act, even according to the witnesses for the Crown, was an independent act done in the lawful exercise of the right of private defence. He accordingly contends that none of the accused was guilty of any offence, and that the order of acquittal passed by the Sessions Court of Farrukhabad was the right and proper order. He further contended, on the authority of *Queen-Empress* v. *Gayadin* (1) and *Queen-Empress* v. *Chotu* (2) that this Court has held that the extraordinary powers conferred by section 417 of the Criminal Procedure Code should be most sparingly enforced, and in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. In the present case the judgment cannot be said to be open to any of these criticisms, and is therefore not a judgment to be interfered with.

Upon turning to the judgment we find that the reasons given by the learned Sessions Judge for acquitting the accused are that

(1) I. L. R., 4 All., 148. (2) I. L. R., 9 All., 52.

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they were a lawful assembly; that Laltu fired and was justified in firing, and he had reason to apprehend that the Brahmans might otherwise be killed, and that therefore there was no riot committed; and it has not been shown that Ajudhia was shot in pursuance of any common object of the assembly of Chaubes, or that the shooting was contemplated by the Chaubes as likely.

The contention that Laltu did not form part of the assembly of Chaubes, but came up independently, is based by Mr. *Wallach* upon a few words which occur in the cross-examination of the witness Buddha. They are to this effect:—

"I saw Prag Dat and Becha Lal (both of them Chaubes) when they came up. Laltu came afterwards. He came from shooting somewhere from the direction of the grove south." The other two witnesses say simply that they saw the Chaubes opposed to the Thakurs, and among the Chaubes was Laltu, Gadariya. Even Buddha places Laltu among the Chaubes from the very commencement of the fight. Laltu was a servant of the Chaubes, and we are satisfied, without any question of doubt, on the evidence of all three witnesses compared together, that Laltu was there in concert and full understanding with the Chaube party. His prompt appearance on the spot, and the precision and readiness with which he, only a servant, acted in concert with his masters, satisfies us that all seven were acting with a common understanding and common intent, and that intent was to prevent the demolition of the *thaonla*, if possible without violence, if necessary by resort to violence, and to extreme violence. We cannot leave out of consideration that the dispute was practically over the removal of a mud wall which could have at any moment been reconstructed at a nominal cost, and the demolition of which would not dissipate all possibilities of recovery of possession, if recourse had been had to courts of law. If a body of men go down to meet another body of men evidently intent upon picking a quarrel over a piece of mud wall, go down armed with a loaded gun and use that gun within a short interval of their arrival, it is for them to rebut the inference which at once

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arises that their intention was by means of criminal force, or show of criminal force, to enforce their rights or supposed rights. We cannot agree with the view taken by the learned Judge, that the Chaubes were in this case entitled to defend their possession *primâ facie* by force. The use of force in defence of property by private individuals is a matter defined by law. The presence of Laltu with his gun, unexplained as it is by any evidence for the defence, proves that the Chaubes were prepared to defend this mud *thaonla* even to the voluntarily causing of death; and the burden lay heavily upon them of proving that they acted under reasonable apprehension that death or serious hurt would be the consequence if the right of private defence were not exercised. The harm intended was so slight that persons of ordinary sense and temper would have, and should have, refrained from taking the law into their own hands.

As regard Laltu, the defence is more explicitly and directly a defence that he acted in exercise of the right of private defence. The law in India is that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon the accused, and it is directed by the Statutes that the Court shall presume the absence of such circumstances. The learned Sessions Judge has entirely overlooked this provision of the law. He has not presumed the absence of circumstances bringing the case within the general exceptions which permit the plea of the right of private defence being raised. The fact that forty or fifty persons began the attack, and that after the attack began Laltu fired a shot which struck Ajudhia, is not enough to show that Laltu was justified in firing. Laltu had to prove that he had reason to apprehend that the Brahmans might be killed. He gave no evidence of this, or of facts from which we could hold it proved. In criminal appeal No 280 of 1897, *Queen-Empress* v. *Rupa*, decided on the 27th of March 1897, Sir John Edge held that when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage in a fight with men who, on the other

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hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other. This appears to us to be a true and sound exposition of the law. The learned Judge, in taking the view he did, has erred both in matter of fact and matter of law, and his order must, in the interests of justice, be set aside. With reference to the contention based upon *Queen-Empress* v. *Gayadin* (1) it must not forgotten that the learned Chief Justice and Mr. Justice Straight, in *Queen-Empress* v. *Gobardhan* (2) did not consider that they were departing from and doing violence to the principles laid down in *Queen-Empress* v. *Gayadin*, and did set aside an order of acquittal where they were satisfied that the Sessions Judge had overlooked important circumstances. Indeed it is not easy to see any distinction in the Crimnal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction. In both cases the appellant has to satisfy us that there does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a Judge who has had all the evidence before him and has arrived at the determination with that great advantage in his favour.

We are satisfied upon the evidence that all the seven accused did go down to the field with the intention of enforcing their rights, or supposed rights, by show of criminal force, and, if need arose, by use of criminal force, and that they thus were members of an unlawful assembly; further that force was used by Laltu in prosecution of the common object of such assembly. All the accused are therefore guilty of the offence of rioting. In prosecution of the common object of the assembly Laltu caused the death of Ajudhia by shooting him, and with the knowledge that what he did was so imminently dangerous that it must in all probability cause his death. We find Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu guilty

(1) I. L. R., 4 All., 148. (2) I. L. R., 9 All., 628.

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of the offence of murder committed in the course of rioting, and by virtue of section 149, read with section 302 of the Indian Penal Code, we direct that Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu suffer each and all of them transportation for life.

APPELLATE CIVIL.

1898
June 14.

Before Mr. Justice Blair and Mr. Justice Burkitt.

UMRAO BIBI (DEFENDANT) *v.* JAN ALI SHAH (PLAINTIFF).*

Suit for cancellation of a deed—Muhammadan law—Plea that the deed was inoperative according to the personal law of the parties.

Held, in the case of a deed of gift between Muhammadans, that it was no ground for cancellation of the deed that, possession of the property, the subject of the deed, not having been made over to the donee, the deed might be, according to the Muhammadan law, inoperative.

THIS was a suit for cancellation of a deed of gift dated the 4th of January 1895, executed by the plaintiff in favour of the defendant his niece, and assigning to the latter a one anna share in a certain village. The plaintiff alleged, that he had really intended to convey the share in dispute to his own daughter, but, that the defendant's husband had fraudulently caused the deed to be executed in favour of the defendant. The plaintiff further pleaded that possession of the property, the subject of the deed had not been made over, and that the deed was therefore void according to the Muhammadan law.

The Court of first instance (Munsif of Bansi) found against the plaintiff on the allegation of fraud, but, finding that possession had not been delivered under the deed, held that the gift, being not complete, was liable to be revoked, and accordingly decreed the plaintiff's claim.

The defendant appealed, and the lower appellate Court (District Judge of Gorakhpur) dismissed the appeal, affirming the decree of the Munsif. The defendant thereupon appealed to the High Court.

* Second Appeal No. 416 of 1896 from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 5th March 1896, confirming a decree of Babu Keshab Deb, Munsif of Bansi, dated the 15th November 1895.