1900

RAM PIARI v. KALLU.

that therefore its refusal to admit the evidence was not an error or defect in procedure within the meaning of section 584. The learned Judge was right in dismissing the appeal before him, and this Letters Patent appeal must also be dismissed.

BANERJI, J.—I am of the same opinion. Under section 568 of the Code, a party to an appeal is not entitled to produce additional evidence in appeal as of right, but the Court may in its discretion admit additional evidence. Where the Court has exercised its discretion and in the exercise of its discretion has refused to admit additional evidence, it cannot be said that a substantial error or defect in procedure has taken place which affords a ground of second appeal under section 584.

*Appeal dismissed.*

1900
*December* 21.

## APPELLATE CRIMINAL.

*Before Mr. Justice Knox and Mr. Justice Burkitt.*

QUEEN-EMPRESS *v.* BHOLU AND OTHERS.*

*Act No. XLV of* 1860 (*Indian Penal Code*), *section* 402—*Assembling for the purpose of committing dacoity—Evidence.*

Several persons were found at 11 o'clock at night on a road just outside the city of Agra, all carrying arms (guns and swords) concealed under their clothes. None of them had a license to carry arms, and none of them could give any reasonable explanation of his presence at the spot under the particular circumstances. *Held*, that these persons were rightly convicted under section 402 of the Indian Penal Code of assembling together with intent to commit dacoity. *The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1), *Balmakand Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3) referred to.

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

Mr. *E. A. Howard*, for the appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

KNOX and BURKITT, JJ.—The five appellants in this case have been convicted by the Sessions Court at Agra of an offence under section 402 of the Indian Penal Code, and sentenced each of them to seven years' rigorous imprisonment.

* Criminal Appeal No. 685 of 1900.

(1) (1894) I. L. R., 22 Calc., 164. (2) (1894) I. L. R., 22 Calc., 391.
(3) (1899) I. L. R., 23 Mad., 159.

1900

QUEEN-EMPRESS v. BHOLU.

The learned counsel who appears for the appellants does not contest the facts of the case. He contends that even upon those facts as proved no offence is established under section 402, inasmuch as there is no evidence from which it can be inferred, either directly or indirectly, that the appellants, when arrested, were assembled for the purpose of committing dacoity.

Now what are the facts? The appellants were arrested at 11 p. m. at night on the 26th of May, 1900. They were all of them heavily armed with guns and swords, and these guns and swords were concealed under their clothes; none of them had any license to carry arms. A further fact, of which we are bound judicially to take notice, is that at that period the district of Agra was notorious as the scene of frequent and recent dacoities. Are the above facts, in the absence of any explanation given by the accused as to why they were assembled together at such a time and under such circumstances, sufficient to permit the inference being drawn that they were assembled for the purpose of committing a dacoity? The facts are certainly not inconsistent with the idea that a dacoity was about to be committed, and had there been evidence that at or about that time and in that vicinity a dacoity had been committed, all the facts above mentioned would have been relevant facts which would have gone far to establish a case of dacoity against the appellants.

It cannot be denied that the assembly of these men, under the circumstances established by the evidence, was of a nature to excite suspicion. The object for which they had assembled and for which they were carrying guns and swords concealed about their persons was a fact specially within their knowledge. The Crown alleged that the object for which they had assembled was the object of committing dacoity. If their object was an innocent or proper one, the explanation could have been given without difficulty. In the absence of any explanation we think that the existence of an intention to commit dacoity has been proved by the evidence given of the conduct of the accused, and the circumstances under which they were arrested. From such conduct and circumstances we are entitled to infer as so probable the existence of an intent to commit dacoity that a prudent man would act upon the supposition that such intention did exist. The burden

1900

QUEEN-EMPRESS v. BHOLU.

of proving the contrary would, in accordance with the provisions of section 106 of the Indian Evidence Act, rest upon the accused. In the view we take of this case we are supported by the precedents :—*The Deputy Legal Remembrancer* v. *Karuna Baistobi* (1), *Balmakund Ram* v. *Ghansam Ram* (2) and *Queen-Empress* v. *Papa Sani* (3). We dismiss the appeal.

## APPELLATE CIVIL.

1900

*December* 22.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

HARBANS LAL (PLAINTIFF) *v.* THE MAHARAJA OF BENARES (DEFENDANTS).*

*Evidence—Presumption—Tenant at fixed rate—Ownership of trees standing on fixed rate tenant's holding.*

A tenant at fixed rates having a transferable right in his holding, the presumption is that the trees standing thereon are the property of the tenant and not of the zamindar.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Munshi *Haribans Sahai*, for the appellant.

Babu *Satya Chandra Mukerji* (for whom Mr. *Abdul Raoof*), for the respondent.

AIKMAN, J.—This appeal arises out of a suit brought by one Harbans Lal against the Maharaja of Benares. The case of the plaintiff was, that three tamarind trees stood in the holding, of which he was a tenant at fixed rates, that the defendant three years previously had taken the fruit of the said trees, and in the month of June preceding the institution of this suit, had sold by auction some branches of the trees and appropriated the proceeds thereof. He accordingly prayed for a declaration of his right to the trees, and asked for a decree of maintenance of possession. In the alternative he prayed that if the Court were of opinion that he was out of possession, a decree might be given for possession. He also asked for damages. For the defendant it was pleaded that neither plaintiff nor his ancestors ever had anything to do with the trees, which, it was asserted, were in the possession of the defendant; that the plaintiff had not been in possession of the

* Second Appeal No. 604 of 1898, from a decree of Babu Mohan Lal, Subordinate Judge of Benares dated the 21st June 1898, reversing a decree of Babu Srish Chander Bose, Munsif of Benares, dated the 15th December 1897.

(1) (1894) I. L. R., 22 Calc., 164. (2) (1894) Ibid, p. 391.
(3) (1899) I. L. R., 23 Mad., 159.