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BALBHADDAR PANDE v. BASDEO PANDE.

"the only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though the first defendant may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The first defendant is not responsible for their acts." We agree in this statement of the law. The present claim is for damages for false imprisonment. If a party is not liable for damages for malicious prosecution under the circumstances indicated above, it is difficult to see how he could be held liable for damages for false imprisonment. We allow the appeal, set aside the decrees of both the lower Courts, and dismiss the suit of the plaintiff with costs in all Courts.

Appeal decreed.

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July 19.

REVISIONAL CRIMINAL.

Before Mr. Justice Sir George Knox.

EMPEROR *v.* ISHRI.*

Act No. XLV of 1860 *(Indian Penal Code), section* 456—*Lurking house-trespass by night—Intention—Burden of proof.*

The accused was found inside the house of the complainant at midnight and his presence was discovered by the wife of the complainant crying out that a thief was taking away her hansli. The evidence of the complainant clearly showed that the accused was not there with the consent, or at the invitation or for the pleasure of the complainant. *Held* that the accused was properly convicted under section 456 of the Indian Penal Code, it being for him to show that his intention was under the circumstances innocent. *Brij Basi* v. *The Queen-Empress* (1) distinguished. *Balmakund Ram* v. *Ghansamram* (2) followed.

IN this case one Ishri was tried by a Magistrate of the first class for an offence under section 457 of the Indian Penal Code, the alleged offence being theft. The Magistrate found that the lurking house-trespass by night was proved, but that the offence which the accused intended to commit was probably not theft. The accused pleaded an *alibi*; the evidence as to this, however, was not believed. The Magistrate convicted the accused under

*Criminal Revision No. 345 of 1906.

(1) (1896) I. L. R., 19 All., 74. (2) (1894) I. L. R., 22 Calc., 39.

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section 456 and sentenced him to six months' rigorous imprisonment. Ishri appealed to the District Judge, who confirmed the conviction, but reduced the sentence to one of three months' rigorous imprisonment. The convict then applied to the High Court in revision, his main plea being that the facts found by the Magistrate were not such as would support a conviction under section 456 of the Indian Penal Code.

Mr. *A. H. C. Hamilton*, for the applicant.

The Officiating Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

KNOX, J.—The accused, Ishri, has been convicted of an offence under section 456 of the Indian Penal Code. I am asked to interfere in revision on the ground that the evidence for the prosecution does not prove that the accused was in the house with a criminal intent. Reliance is placed upon the case, *Brij Basi* v. *The Queen Empress* (1). The present case differs from *Brij Basi* v. *Queen-Empress* in one very important point. In the case quoted the offence of which the accused was convicted was house-trespass with intent to commit adultery. The husband was not called as a witness and did not appear as a witness, and the nephew who was the complainant and who was living in the house, was also not called as a witness. In the present case the husband was called as a witness and gave evidence at great length. He was cross-examined at considerable length also, and throughout the cross-examination the question was never asked him—"Did not Ishri come into the house with your consent?" One thing is abundantly clear from his evidence that Ishri's presence in his house, namely, the complainant's house at midnight was not with the consent, or at the invitation of or for the pleasure of the complainant. The case is a very simple one. The accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her hansli. This may have been conjecture on her part, but whatever the intent was with which the accused entered the house, the knowledge of that intent is specially within his knowledge, and if that intent was an innocent one, it was for him to say what it was, even if I do not go so far

(1) (1896) I. L. R., 19 All., 74.

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as the Indian Evidence Act requires me to go, as the burden of proving it is on him. In his defence the accused set up an *alibi*. The learned counsel who appears for the accused strenuously contended that inasmuch as the intention was an ingredient of an offence under section 456, it was for the prosecution to prove that the intention was a criminal one. In other words, if the owner of a house wakes up at midnight and finds a person inside the house and if he is not able to prove that he came there with a criminal intent and that man denies that he came to the house, it is still for the owner to prove that that intent was a criminal one. I fully agree with what has been laid down by the Judges of the Calcutta High Court in a precisely similar case—*Balmakund Ram* v. *Ghansamram* (1)—and it is not for the first time in this Court that I have laid down the same. The learned Judges say, *vide* page 407:—"We were told that this did not prove any intention, though it might raise a suspicion of the intention being guilty. But what is the meaning of proof as defined in the Evidence Act, which is the law of the land? By section 3 of the Act 'a fact is said to be proved, when after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.' That is the definition which the Legislature has laid down for our guidance as to when a fact is said to be proved. We may add that it is only the embodiment of a sound rule of common sense: and applying this definition and this rule of common sense to this case, we feel bound to say that a guilty intention is proved in this case and that it must have been some one of those mentioned in section 441 of the Indian Penal Code, though it is not easy to say precisely which of those it was." The petition fails, and I dismiss it.

(1) (1894) I. L. R., 22 Calc., 391.