

that the learned Judge altogether lost sight of the finding that the owners of the different mahals were all in exclusive possession of particular plots. The only inference which can be drawn from this is that the parties by mutual consent allowed the owners of the different mahals to separately enjoy the different parts of the *abadi*, in other words, that there was an agreement between the parties. This agreement must be inferred from the action of the parties themselves. So long, therefore, as this agreement continues, the parties in exclusive possession of a part of the *abadi* are entitled to use it and enjoy it in such way as they please, so long as such use or possession does not interfere with the use of owners of other mahals of what is in their separate possession. This principle was fully recognized in the case of *Kumudini Mazumdar v. Rasik Lal Mazumdar* (1). We think that the decisions of the courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both appeals to this court.

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Appeal allowed.

REVISIONAL CRIMINAL.

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Before Mr. Justice Champier.

EMPEROR v. SARDAR AND OTHERS.*

Criminal Procedure Code, section 423—Appeal—Power of appellate court to alter finding of acquittal into one of conviction.

An appellate court can, under section 423 of the Criminal Procedure Code in an appeal from a conviction, alter the finding of the lower court, and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen-Empress v. Jabanulla* (2) followed.

In this case several persons were charged by a Magistrate with offences under section 147 read with section 225 and section 353 of the Indian Penal Code. The Magistrate convicted six of them under section 147 read with section 225 of the Code and sentenced them to three months' rigorous imprisonment.

* Criminal Revision No. 505 of 1911 from an order of W. J. D. Burkitt, Sessions Judge of Saharanpur, dated the 7th August 1911.

(1) (1906) 11 C. W. N., 517. (2) (1896) I. L. R., 23 Cal., 975.

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He also convicted two out of the six, Sardara and Wazira, under section 353 of the Code and sentenced them to three months' rigorous imprisonment each. On appeal the Sessions Judge maintained the conviction of Sardara and Wazira under section 353 and convicted the remaining appellants also under section 353, instead of under section 147 read with section 225. The convicts applied to the High Court in revision urging that it was not open to the appellate court to convict under section 353 of the Code such of the applicants as had been charged with, but not convicted of, the offence therein defined by the Magistrate.

Mr. C. Dillon, for the applicants.

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

CHAMBER, J.—Hargu obtained a warrant from a Magistrate under section 100 of the Code of Criminal Procedure for the production of a woman named Daulatia, who was said to be in illegal confinement. The Sub-Inspector, some constables and the chaukidar went to get the warrant executed. The appellants, Wazira and Sardara, refused to allow the police to search the house in which the woman was said to be concealed. Ultimately she was brought to the door, but they declined to give her up to the police. Later, Sardara, Wazira and others made an attack upon Hargu and Mula. There was also an attack of some kind on the police. The first court framed a charge against all the accused under sections 147/225 and 353 of the Indian Penal Code. In the result it sentenced six of them, including Sardara and Wazira, to three months' rigorous imprisonment under section 147/225, and convicted Wazira and Sardara under section 353 of the Indian Penal Code also, and sentenced each of them to three months' rigorous imprisonment. On appeal the Sessions Judge modified the order of the Magistrate. It is not quite clear what he intended to do, but I think he intended to confirm the conviction of Wazira and Sardara under section 353 of the Indian Penal Code on account of their attack on the police and the rescue of Daulatia and to convict all six appellants under section 353 of the Indian Penal Code, instead of under sections 147/225, on account of their conduct before Daulatia was arrested. On the facts found it seems to me that all six were rightly

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convicted under section 353 of the Indian Penal Code. It is contended that the order of the Sessions Judge convicting under section 353 of the Indian Penal Code those whom the Magistrate had declined to convict of that offence was illegal as it was not open to the Sessions Judge to convert an acquittal into a conviction. This point was considered in the case of *Queen-Empress v. Jabamulla* (1). The High Court held that an appellate court could, under section 423 of the Code of Criminal Procedure, in an appeal from a conviction under one of several sections of the Indian Penal Code mentioned in the charge-sheet, alter the finding of the lower court and find the appellant guilty of an offence of which he had been acquitted by that court. This ruling is in accordance with the common practice of these provinces. Accused persons are often charged with having committed several offences, and the Magistrate convicts them of one offence only. On appeal the Sessions Court takes a different view and convicts the accused of one of the offences of which the Magistrate has declined to convict the accused. Very little violence was used in this case. I think I may properly reduce the sentences passed on the applicants to two months' rigorous imprisonment each. The sentences upon Wazira and Sardara will be concurrent. In other respects I dismiss this application. The applicants must surrender to their bail to undergo the remaining portion of their sentences.

Application dismissed.

(1) (1896) I. L. R., 23 Cal., 975.