

APPELLATE CRIMINAL.

1912

June, 27.

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR v. KANHAI AND OTHERS.*

Act No. XLV of 1860 (*Indian Penal Code*), sections 300 and 325—*Murder—Grievous hurt—Common intention—Deadly assault with lathis on an unarmed person—Presumption.*

Four persons armed with *lathis* attacked and severely beat a fifth, who was unarmed, over a dispute about irrigation. The person attacked died in consequence of this beating, and it was found that he had received several severe blows on the head, the result of which was that the bones of the skull were broken to pieces, and also other injuries about the body, most of the injuries having probably been inflicted whilst the person attacked was on the ground; but the evidence did not disclose which of the assailants caused which of the injuries. *Held*, that all four assailants were properly convicted of murder under the fourth clause of section 300 of the *Indian Penal Code*, and that the inference was not justified that common intention of the assailants was not more than the causing of grievous hurt.

THE facts of this case were as follows:—

In the month of August, 1911, one Sujan was irrigating his field, when four persons—Kanhai, Diwan, Karan Singh and Ganga Sahai—came up armed with *lathis* and told him to stop, because they wanted to irrigate their own. A dispute ensued, and the four attacked Sujan, who was unarmed, and beat him severely so that he died. The medical evidence disclosed that several blows were inflicted on Sujan's skull, which resulted in a compound fracture thereof, the bones being broken into many pieces. In addition to these injuries to the head there were six injuries on other parts of the body, and it appeared that most of the injuries had been inflicted whilst the deceased was lying on the ground.

The four assailants were tried by the Assistant Sessions Judge of Aligarh and convicted under section 325 of the *Indian Penal Code* and sentenced to five years' rigorous imprisonment each. They appealed to the High Court, and their convictions and sentences were set aside and a fresh trial ordered. On the second trial they were convicted of the offence of murder and sentenced to transportation for life. From these convictions and sentences the four accused again appealed to the High Court.

Babu Satya Chandra Mukerji (for whom Babu Piari Lal Banerji), for the appellants.

* Criminal Appeal No. 870 of 1912.

1912

EMPEROR
v
KANEAL.

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

KARAMAT HUSAIN and TUDBALL, JJ:—The four appellants Kanhai, Diwan, Karan Singh and Ganga Sahai have been convicted of the offence of murder and have been sentenced to transportation for life. They appeal. They were originally tried and convicted by the Assistant Sessions Judge under section 325, Indian Penal Code, and sentenced to five years' rigorous imprisonment each. They appealed to this Court and the learned Judge before whom their appeals came set aside the convictions and sentences and ordered them to be re-tried for the offence of murder under section 302, Indian Penal Code. They have now been tried and convicted of that offence. The facts established by the evidence are briefly as follows:—In the month of August last, when there was a great demand for water for the purpose of irrigation and all cultivators were eager to get as much water as possible, the deceased was watering his field early in the morning before day-break, when the four accused, armed with *lathis*, went up to him and demanded that he should cease irrigating his field, so that they might irrigate their own. A wrangle ensued. The deceased was unarmed and defenceless. Finding that he was obstinate and would not give way, the four accused attacked him with their *lathis*. The medical evidence shows that several blows were inflicted on the skull, which resulted in the compound fracture thereof, the bones being broken into many pieces. In addition to these injuries on the head there were six injuries on other parts of the body. It is therefore quite clear that the accused inflicted a very severe beating, and that most of the injuries must have been inflicted when the deceased was lying on the ground. It is urged in their defence that the evidence does not disclose which of the injuries were inflicted by each of the accused respectively; that their common intention cannot possibly have been more than to voluntarily cause grievous hurt to the deceased, and that therefore, they ought to have been convicted under section 325 of the Indian Penal Code. We are unable to agree with this contention. The circumstances of the case and the fact that the accused were all armed with *lathis*; that the deceased was defenceless and unarmed; that the beating must have

1912

EMPEROR
v.
KANHAI.

been a prolonged one, and that several blows were inflicted on the skull completely smashing it, leave very little doubt that the intention of the accused was to inflict such bodily injury as was likely to cause death. The fourth clause of section 300 of the Indian Penal Code applies, and the accused have been rightly convicted of the offence of murder as defined in the Code. The lesser of the two sentences has been imposed, and there is no doubt as to the guilt of the accused. We therefore dismiss the appeal and maintain the convictions and sentences.

[*Cf. Emperor v. Bhola Singh*, I.L.R., 29 All., 282—ED.]

PRIVY COUNCIL.

* P C.
1913
April 16, 29.

DEBI BAKHSH SINGH (PLAINTIFF) v. HABIB SHAH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Plaintiff, non-appearance of—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Civil Procedure Code (1908), order IX, rules 8 and 9—Order XXII, rules 3 and 9—Sections 115 and 151—Rules and orders applicable only to defaulters wrongly applied in case of dead party.

On the non-appearance of the plaintiff in a suit against the respondent an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time the order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend court. These facts were brought to the notice of the Deputy Commissioner in an application made under order XXII, rules 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under section 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order, and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under order IX, rule 8, of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that order XXII, rule 3, of the Code applied only to a still pending suit, and not to one that had been dismissed.

Held (reversing the decisions of the Court of the Judicial Commissioner) that those decisions were vitiated by applying to a dead man orders and rules

* *Present*:—Lord SHAW, Lord Moulton, Sir JOHN EDGE and Mr. AMBER ALI.