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ROBERT WILLIAM ANDERSON v. THE BANK OF UPPER INDIA LIMITED

became quite immaterial. In our opinion the plaintiff Bank are not entitled to the profits in the hands of the receiver, nor are they entitled to any portion of the proceeds of the sale, save so far as the same are attributable to or represent the "good-will" of the business. In our opinion also the Bank are not entitled to a personal decree against the appellant.

It is unnecessary to decide the question of the amount to realize which the Bank were entitled to bring the mortgaged property to sale. It seems to us more than doubtful that they were entitled to add to their debt any sum that was not strictly paid or advanced for the purpose of preserving their security, e.g., premium paid to keep up the policy of insurance.

Before passing a final order in the case we think it desirable to refer an issue to the court below, namely "what portion, if any, of the proceeds of the sale represents the value of the good-will."

Issue remitted.

REVISIONAL CRIMINAL.

Before Justice Sir George Knox.

1915
April 8.

EMPEROR *v.* MULLA*.

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

The accused was found inside the complainant's house at 2 a. m., and when arrested made no statement as to his reasons for being there. On being sent up for trial he stated, but could not prove to the satisfaction of the court, that he had an intimacy with a widow living in the house. *Held* that the presence of the accused in the house at that hour pointed to a guilty intent and it was for him to rebut that presumption. *Emperor* v. *Ishri* (1) followed. *Emperor* v. *Jangi Singh* (2), *Sella Muthu Servaigaran and Mottayan* v. *Palla Muthu, Karuppan* (3) *Q.E.* v. *Rayapadayachi* (4) and *Premanundo Shaha* v. *Brindabun, Chung* (5) referred to.

THE facts of the case were as follows :—

The accused was found inside the complainant's house at 2 a. m. He had effected his entrance during the temporary absence

* Criminal Revision No. 159 of 1915 from an order of Austin Kendall, Sessions Judge of Cawnpore, dated the 8th of February, 1915.

(1) (1906) I. L. R., 29 All., 46. (3) (1879) 21 M. L. J., 161.

(2) (1903) I. L. R., 26 All., 194. (4) (1911) I. L. R., 19 Mad., 240

(5) (1895) I. L. R., 22 Calc., 994.

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of the complainant. The complainant stated that when caught the accused had on his person some property belonging to the complainant. The accused was charged with having committed lurking house trespass by night with an intent to commit theft. He stated that he had gone inside the house as he had an illegal intimacy with the widowed aunt of the complainant and had been invited by her. It was not proved that any stolen property had been found on the person of the accused. He was convicted and sentenced under section 457, Indian Penal Code. On appeal the Sessions Judge upheld the conviction and sentence. The accused applied to the High Court in revision.

Pandit *Kailas Nath Katju*, for the applicant:—

For a conviction under section 457, Indian Penal Code, it is necessary for the prosecution to establish, first of all, that there has been criminal trespass as defined by section 441. It is an essential ingredient of the offence of criminal trespass that the accused should have intended to commit an offence or to intimidate, insult or annoy as specified in section 441, Indian Penal Code. The prosecution alleged that the intention was to commit theft; but it failed to establish this allegation. There is no suggestion what other offence the accused intended to commit. Illegal intimacy with a widow is not an offence under the Indian Penal Code. Every civil trespass is not a criminal offence. It is not sufficient that his presence, if discovered, might be annoying to the owner of the house. *Emperor* v. *Jangi Singh* (1), *In the matter of the petition of Gobind Prasad* (2), *Shib Nath Banerjee, petitioner* (3) and *Lajje Ram* v. *Queen-Empress* (4).

Intimidation, insult or annoyance requires the actual presence of the party who is to be intimidated, insulted or annoyed; *Balmakand Ram* v. *Ghansam Ram* (5). In the cases of *Emperor* v. *Ishri* (6) and *Premanundo Shaha* v. *Brindabun Chung* (7) the accused pleaded *alibi* which plea was found to be false; and in the absence of any explanation of his presence the court could well come to the conclusion that his

(1) (1903) I. L. R., 26 All., 194.
(2) (1879) I. L. R., 2 All., 465.
(3) (1875) 24 W. R., Cr. R., 58.
(4) Punj. Rec., 1898, Cr. J., No. 12.
(5) (1894) I. L. R., 22 Calc., 391 at p. 404.
(6) (1906) I. L. R., 29 All., 46.
(7) (1895) I. L. R., 22 Calc., 994.

intention was not an innocent one. In the case of *Brij Basi* v. *The Queen-Empress* (1) the facts were similar to those of the present case and the accused was acquitted. Both the lower courts having discredited the allegation of theft, a charge under section 456 of entering the house with an object not specified but which is presumed to be criminal cannot be sustained when the person has gone to trial under the specific charge of theft in a dwelling house; *Jharu Sheikh* v. *The King-Emperor* (2).

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown, was not called upon.

KNOX, J.—The facts found in this case are as follows:—Suraj Kumar, a Brahman and cultivator, left his house on the 26th of December, 1914. His intention was to catch a train and go to Cawnpore. He took the precaution of having his house carefully closed for the night. He returned, having missed his train, somewhere about 2 a. m. He found the door which had been securely closed wide open. He says that somewhere inside his house he caught hold of Mullo, a *gadariya*, who was trying to escape and that on Mullo's person were certain jewels, the property of Suraj Kumar. This portion of the evidence has apparently been discredited by both courts and for the purpose of this case this alleged fact may be omitted from consideration altogether. The accused when he was caught by Suraj Kumar said that he had gone inside the house in connection with an illegal intimacy with Suraj Kumar's aunt, who is said to be a widow. The facts then that have to be faced are that a complete stranger is found inside a Brahmin house at 2 a. m. in the morning having entered that house by a door which the Brahmin had taken care to secure at night. He is inside the house and when discovered is trying to escape. He does not when arrested by the owner of the house make any statement to the effect that he is there with any lawful intent. The intent with which he went was a matter within his knowledge; the burden of proving that his intention was an honest intention lies upon him. In the present case he alleges that he went with the intention of pursuing an intimacy, I will not call it criminal just now, but an intimacy with a Brahmin widow. He is not able to establish that any illegal intimacy of

(1) (1896) I. L. R., 19 All., 74. (2) (1912) 16 C. W. N., 696.

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any kind had existed at any time between him and the Brahmin widow. Looking to the words contained in section 3 of the Evidence Act I hold that both the courts below were right in holding that it had been fully proved that the accused had committed lurking house trespass by night and that it is very doubtful whether they erred in holding that an offence under section 457 had been established against the accused.

I am asked to interfere in revision against this conviction and sentence, because no offence under section 457 of the Indian Penal Code has been made out and the conviction is bad in law. A long and laboured argument has been addressed to me which really rests on this, at its strongest point, that it was for the prosecution to establish criminal intention and that until they proved that criminal intention the accused was entitled to an acquittal.

The learned vakil who appeared for the applicant took his stand upon the case of *Emperor* v. *Jangi Singh* (1), and drew my attention, in particular, to the words to be found in this ruling at page 195. "His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass. Proof of an intention to commit an offence or to intimidate, insult or annoy was necessary. There was no evidence of any such intention, or from which such an intention might be reasonably inferred." The facts of that case are somewhat peculiar. A zamindar had a quarrel with an occupancy tenant and when he was absent from the village by reason of ill-health he induced the patwari to record that the occupancy tenant had left the village and abandoned his holding and therefore took possession of it. The learned Chief Justice who decided *Emperor* v. *Jangi Singh* evidently arrived at the conclusion that the facts found in this case were not sufficient to establish a *primâ facie* case of criminal trespass and it was necessary to consider further what was the intention of the zamindar who entered on this occupancy holding.

I was also referred to the ruling of *Gobind Prasad* (2). The line of argument in this case, if carefully considered, will be found to be much the same. In that particular case the pleader who appeared to support the case went so far as to say that where an entry upon property is in itself illegal, that is sufficient to establish one of the

(1) (1903) I. L. R., 26 All., 194. (2) (1879) I. L. R., 2 All., 465.

criminal intents required by section 441, and it was held by Mr. Justice STRAIGHT "that the intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires." With all due respect to the learned Judge this has in my opinion been too broadly stated and I note that it has not been followed by some of the courts. Cases of this kind really rest upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused it is for the accused to rebut that guilty intention and if he does not so rebut it the guilty intent is as much found against him as his entry into or upon the property.

In *Sella Muthu Servaigaran and Mottayan* v. *Palla Muthu Karuppan* (1), the learned Judges who decided that case, and one of them was a Hindu Judge of great experience, referred to a previous case of *Queen-Empress* v. *Rayapadayachi* (2) and held that the law on this point was correctly laid down in that case. "Although there is no presumption that a person intends what is merely a possible result which though reasonably certain is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. In the present case the ordinary and natural consequences of the petitioners' acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners, as reasonable men, must have known that such consequences would follow from their acts. They must, therefore in my judgement, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petition must be dismissed."

In a previous case of this Court which came before me where I had to deal with a very similar case—*Emperor* v. *Ishri* (3)—I held that when an accused was found inside the house of the complainant at midnight, and his presence was discovered by the

(1) (1879) 21 M. L. J., 161. (2) (1911) I. L. R., 19 Mad., 240.
(3) (1906) I. L. R., 29 All., 46.

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wife of the complainant crying out that a thief was taking away her *hansli* it was for the accused to prove that his intention was an innocent one and in that case I referred to a previous case of *Brij Basi* v. *The Queen-Empress* (1) which I distinguished from the case before me. I see no reason to depart from what I then laid down.

The learned vakil for the applicant drew my attention to another case of *Premanundo Shaha* v. *Brindabun Chung* (2). In that case the learned Judges delivered themselves of certain observations which were *obiter dicta* which otherwise went to support the contention set up by the vakil. To my mind to hold that if a stranger is found inside a *zenana* at 2 in the morning he can escape from the consequences of his act by saying that he came there at the bidding of the wife or other inmate would be a most dangerous doctrine and the act is deserving of severe punishment.

This brings me to the third point raised in this application, i.e., that the sentence of six months is unduly severe. I am not prepared to accede to this. The result is that I find the accused guilty under section 456 of the Indian Penal Code but I do not interfere with the sentence passed. The accused is said to be on bail; he will surrender to his bail and complete his sentence.

Application dismissed.

FULL BENCH.

1915
April 9.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir Pramada Charan Banerji and Mr. Justice Tudball.

GAYA DIN AND OTHERS (PLAINTIFFS) *v.* JHUMMAN LAL AND OTHERS (DEFENDANTS).*

Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 132—*Limitation—Suit to enforce payment of money charged upon immoveable property—Instalment bond—Meaning of "becomes due."*

A mortgage deed executed on the 16th July, 1890, provided that the mortgagors pay the principal amount secured in ten years by instalments of Rs. 625 yearly and that interest should be paid monthly. There was this further clause:—"If we fail to pay the interest aforesaid in any month, on the principal by the stipulated period, as specified above, or no payment is made

* First Appeal No. 223 of 1913, from a decree of Shekhar Nath Banerji, Subordinate Judge of Mainpuri, dated the 27th March, 1913.

(1) (1896) I. L. R., 19 All., 74. (2) (1895) I. L. R., 22 Calc., 994.