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KUNDAN LAL v. BHIKARI DAS. ISHWAR DAS.

[A portion of the judgement, not material to this report, is here omitted.]

We think that it is absolutely necessary to ascertain definitely whether the plaintiffs have actually discharged the defendants' liability to the Bombay firm or not. The plaint did not contain any express allegation as regards this matter, because it was principally based on the two *hundis*. We accordingly think that before we finally dispose of the appeal it is necessary to have additional evidence and a fresh finding on the question of the extent to which the plaintiffs have discharged the defendants' liability to the Bombay firm in pursuance of the agreement which was entered into between the parties on the 15th of December, 1922. We accordingly send down the above issue to the court below for a finding and report.

REVISIONAL CRIMINAL.

Before Mr. Justice Boys.

1929 *January*, 3.

EMPEROR *v.* MEWA LAL AND OTHERS.*

Criminal Procedure Code, section 106—*Security for keeping the peace—Conviction under section* 323, *Indian Penal Code—Offence involving a breach of the peace—Likelihood of recurrence—Graver offence proved than that charged—Duty of court—Summary trial.*

It is not right for a court to minimise an offence and shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily.

In all ordinary cases of conviction under section 323 of the Indian Penal Code there is a conviction for an offence involving a breach of the peace, and the necessity and desirability of taking security under section 106 of the Code of

*Criminal Reference no. 823 of 1928.

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Criminal Procedure must be judged in each case and must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur.

Emperor v. *Atma Ram* (1) and *Muhammad Rahim* v. *Emperor* (2), explained. *Sobha Ram* v. *Emperor* (3), followed.

The applicants were not represented.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

BOYS, J. :—This is a reference by the learned Additional Sessions Judge of Pilibhit. Five persons were convicted under section 323 of the Indian Penal Code and four of them were sentenced to pay fines. A boy of the name of Debidin was ordered to be released and made over to a relative on the execution of a bond for his good behaviour. Further, the four adult accused were ordered to furnish security under section 106 of the Code of Criminal Procedure for a period of one year. The four adult accused applied in revision to the Sessions Judge of Pilibhit,—an application which resulted in this reference. The effective ground taken in revision was that it having been found that five persons took part in the assault there was a riot, and the Magistrate had no jurisdiction to try the case summarily. It has been repeatedly held that it is not right to minimize an offence, for the court to shut its eyes to a graver offence which on the facts found by it has been committed, and to refrain from charging the accused with that offence, and by such abstention to justify itself in trying the case summarily. The learned Sessions Judge has referred the case on this amongst other grounds. He has also expressed an opinion that a sentence of imprisonment was called for if the accused were, as they were found to be, guilty. The Magistrate found : "The high-handed manner in which the accused have tried to take the law

(1) (1926) I.L.R., 49 All., 131. (2) (1925) 23 A.L.J., 1053.
(3) Cr. Ref. No. 18 of 1928, decided on 2nd May, 1928.

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into their own hands does not require that a lenient view should be taken. Still I would not send the accused to jail." At the re-trial which I am going to order, the Magistrate will no doubt not allow himself to be prejudiced by the fact that the accused have already been found guilty by another court. He will similarly exercise his own judgment as to the appropriate punishment, should he arrive at a finding of guilty.

Before concluding it is necessary to mention another point on which the learned Judge has referred the case, since I am not in agreement with him. The trial Magistrate, convicting the five persons under section 323 of the Indian Penal Code, held: "Five men caused serious injuries in a high-handed manner to an old man and their action involved a breach of the peace; there are, as I have already said, old sores that have not healed up; there is the section 498 affair still fresh and the accused have shown a spirit of intolerance. I am of opinion that it is necessary to bind the accused to keep the peace." He proceeded to bind the accused over under section 106 of the Code of Criminal Procedure to keep the peace for one year.

The learned Sessions Judge appears to have been of opinion that that order under section 106 was illegal. He refers to a decision of a Judge of this Court in *Emperor* v. *Atma Ram* (1). That case followed a decision of the same Judge in *Muhammad Rahim* v. *Emperor* (2). The learned Judge in *Muhammad Rahim* v. *Emperor* said:—"Upon the mere finding that the accused and the complainant were not on good terms it is impossible to maintain the order passed, which does not come within the purview of section 106 of the Code of Criminal Procedure," and in the case of *Emperor* v. *Atma Ram* the

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learned Judge remarked: "Now section 323 of the Indian Penal Code is not an offence referred to in section 106 of the Code of Criminal Procedure, but even then an order can be passed after a conviction under this section if it was found by the Magistrate that the offence involved a breach of the peace. But there must be a finding of the Magistrate; otherwise his order is not justified." These remarks have been understood by the learned Sessions Judge to lay down a rule that security cannot be demanded under section 106 of the Code of Criminal Procedure, where there has been a conviction under section 323, merely on the ground that there is ill-feeling between the parties and that there are old sores not healed up. I am inclined myself to think that the learned Judge's decisions in the cases referred to were on their particular facts. For instance he describes the case *Emperor* v. *Atma Ram* (1) in the following words:—"This was a case under section 323 of the Indian Penal Code and it arose simply on account of *a sudden altercation* over a trivial matter." If this is all that there was to show that the parties bore ill-feeling towards each other, it may well be that in the opinion of the learned Judge there was no sufficient indication that in the terms of section 106 it was "necessary to require such person to execute a bond for keeping the peace." But the necessity must be judged in each case. I do not think that either of the two cases throws any doubt on the proposition of law that in all ordinary cases of conviction under section 323 there is a conviction for an offence involving a breach of the peace, and the desirability of taking security must depend upon how far the circumstances indicate that such a breach of the peace is likely to recur. This is the view upon which Mr. Justice KING and I myself acted without hesitation in the case *Sobha Ram* v. *Emperor* (2). It will, therefore, be open to the

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Magistrate at the re-trial to take a bond under section 106 if in his opinion the facts proved indicate the likelihood of a breach of the peace in the future on the part of the accused, of course provided that he has arrived at a conviction within section 106.

Accepting the reference I set aside the convictions and sentences and direct that the fines, if paid, be returned, and that the five accused persons be re-tried in the court of a competent Magistrate in a regular trial, not summarily, upon charges under sections 323 and 147 of the Indian Penal Code, and any other charges that may be disclosed by the evidence.

APPELLATE CRIMINAL.

Before Mr. Justice Dalal.

1929
January, 8.

EMPEROR *v.* JANESHAR DAS AND ANOTHER.*

Criminal Procedure Code, sections 233, 234, 236, 239—*Joinder of charges against several accused—Abetment as alternative charge counts as a distinct charge—Joint trial of two accused for three offences of the same kind, each accused being also charged in the alternative with having abetted the other—Prejudice.*

Two servants of a Government treasury were charged with three offences of criminal breach of trust, committed within the space of twelve months; each accused was also charged, in the alternative, with abetment of breach of trust committed by the other, in respect of each of the three items. They were tried jointly in one trial on all the charges. *Held* that when a man was charged in the alternative with embezzlement or abetment thereof he had to meet two distinct sets of circumstances, and each of the accused therefore was really tried for six offences. This was against the spirit of the provisions of section 233 of the Code of Criminal Procedure and was not covered by any of the exceptions detailed in the sections following it. The trial was illegal; and the question whether the accused were prejudiced or not did not arise.

* Criminal Appeal No. 749 of 1928, from an order of Pratap Singh, Additional Sessions Judge of Meerut, dated the 3rd of September, 1928.