APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Bajpai.

1933
May, 2

EMPEROR *v.* RAGHUNATH AND OTHERS*

Criminal Procedure Code, section 423—Powers of appellate court—Appeal from conviction—Charges of culpable homicide and rioting—Trial court convicting on the former but omitting to record either conviction or acquittal on the latter—Whether acquittal by necessary implication—Power of appellate court to convict on the latter charge.

At a sessions trial on charges of culpable homicide and rioting, under sections 304 and 147 of the Indian Penal Code, the Judge convicted and sentenced the accused persons under section 304, but omitted to record either a conviction or an acquittal on the charge of rioting under section 147. The language of the judgment, however, made it quite clear that the Judge found that the accused persons were guilty of rioting and that the homicide was an incident in the course of the riot and that the accused persons were therefore jointly responsible, although the individual responsibility of any one for the killing had not been established beyond doubt. In appeal against the conviction,—

Held that in the circumstances it could not be deemed that the accused persons had by necessary implication been acquitted of the offence under section 147; in fact the findings of the Judge amounted to a conviction under that section as well as under section 304. Further, under the provisions of section 423 of the Criminal Procedure Code, in an appeal from a conviction the appellate court had power to alter the finding while maintaining the sentence, and the conviction under section 304 could be altered into a conviction under section 304 read with section 149 of the Indian Penal Code although the Sessions Judge had not recorded any conviction under section 147 and therefore might possibly be deemed to have acquitted the accused of that charge. *Kishan Singh* v. *King-Emperor* (1), distinguished.

Messrs. *K. O. Carleton* and *Kumuda Prasad*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

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*Criminal Appeal No. 737 of 1932, from an order of D. C. Hunter, Sessions Judge of Moradabad, dated the 15th of August, 1932.

(1) (1928) I.L.R., 50 All., 722.

KING and BAJPAI, JJ. :—This is an appeal by Raghunath and six other persons who have been convicted under section 304 of the Indian Penal Code. Two of the appellants, Kishan Sarup and Bishan Sarup, have been sentenced to eight years' rigorous imprisonment and the rest to six years. The case for the prosecution, briefly, was that on the 7th of May, 1932, Kishan Sarup and Bishan Sarup (who are zamindars and residents of Kanth) came with a number of men, about thirteen or fourteen in all, to the village of Qasimpur, which is about one mile from Kanth, for the purpose of collecting subscriptions. They intended to collect subscriptions for the defence of one Raghunath who was under trial before a Magistrate. The party came armed with spears and lathis. On arrival at Qasimpur they called for the Padhan named Girdhari, but he was not in the village. His brother Kanhaiya was then sent for and Kishan Sarup and Bishan Sarup demanded Rs.15 from him as subscription towards Raghunath's defence fund. Kanhaiya raised objections to paying the subscription and tried to go back into his house but he was followed up with abuse and Kishan Sarup struck him with a lathi. He fell down and shouted for help, whereupon Bishan Sarup ran him through with a spear. This gave rise to a general fight between the villagers and the visiting party. Blows were given and received by both sides and after some fighting the visiting party left the village. Kanhaiya was taken to the Kanth hospital where he died the same day.

The facts of the riot are sworn to by a number of witnesses, some of whom were unquestionably in the fight as they themselves received injuries. Such witnesses are Genda, Imrat, Bhup and Mohan. They and the other persons who swear to having seen or to having taken part in the fight, all give very much the same account. They all testify that the appellants

were among the party who came under the leadership of Kishan Sarup and Bishan Sarup to the village of Qasimpur for the purpose of collecting subscriptions and when Kanhaiya refused to give the subscription demanded he was beaten by Kishan Sarup and stabbed with a spear by Bishan Sarup and that this started the fight between the villagers and the party of Kishan Sarup.

The learned Sessions Judge has found that it is not clearly proved that Kishan Sarup is the man who struck the first blow upon Kanhaiya, which gave rise to the subsequent fight. As a matter of fact, the medical evidence shows that there were no marks of lathi blows upon the person of Kanhaiya. He was killed by a spear thrust. The Sessions Judge also finds it doubtful whether Bishan Sarup was the man who killed Kanhaiya with the spear. He finds that undoubtedly the appellants were all among the party which came to the village for demanding subscriptions and that they were armed, some with lathis and others with spears, and that their common object was to extort subscriptions by show of force and by use of force if necessary. He further finds that on account of Kanhaiya's resistance to the demand for subscriptions some violence was used by the accused but it cannot be said by which individuals among them, and this started a general fight between the accused and the villagers in the course of which Kanhaiya was killed by one of the accused with a spear thrust and several other villagers were more or less seriously injured. The learned Sessions Judge does not find that the account given by the witnesses, namely that Bishan Sarup is the man who struck the blow with the spear, is definitely false. He finds indeed that Bishan Sarup *probably* was the man who was responsible for this spear thrust, but he thinks that in view of the language used in the first information report there is some doubt whether Bishan Sarup was specially and individually responsible for the mortal wound upon Kanhaiya Lal.

[The judgment then referred to the evidence and came to the conclusion that the appellants Kishan Sarup and Bishan Sarup were among the rioters and were the leaders and that the other five appellants also did take part in the fight.]

A question of law has been raised on the basis of the fact that the appellants have been convicted under section 304 of the Indian Penal Code only and have not been convicted under section 147 of the Indian Penal Code. The argument is that as the appellants were expressly charged with an offence under section 147 of the Indian Penal Code and have not been convicted of that offence, it must be assumed that they have been acquitted of the offence of rioting. As they have been acquitted of the offence of rioting, section 149 cannot be invoked for the purpose of establishing the joint responsibility of all the appellants for having caused the death of Kanhaiya. The appellants, moreover, cannot be held jointly responsible under section 34 of the Indian Penal Code, as the finding is that they had no common intention of killing Kanhaiya. As none of the appellants have been found individually responsible for causing Kanhaiya's death, their learned advocate claims that they are all entitled to an acquittal.

It appears to us that the learned Sessions Judge's finding is perfectly clear to the effect that the accused did become members of an unlawful assembly and that certain members of that assembly did use force and violence in prosecution of their common object which was to extort subscriptions by force, and therefore they were all guilty of the rioting. The learned Sessions Judge sums up his findings briefly as follows: "I have no doubt what happened. Kishan Sarup, Bishan Sarup, and a large body of retainers, the whole party armed with lathis and spears, appeared in Qasimpur and demanded subscriptions for Raghunath. They were refused and there was a fight. Kanhaiya was killed in the course of the fight, probably by Bishan Sarup, and that probably finished

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the fight." He further observes: "Of course these people did not come to the village intending to murder Kanhaiya or anybody else. But they did come in considerable force and heavily armed, intending thereby to extract subscriptions from people who might not be moved by mere persuasion. I cannot assume that they failed to realise that resistance might be met with, and I cannot assume that they intended their armament for mere display, not for use if occasion called. Exactly how the fighting started I cannot say. But when a gang of armed men come to a village to levy money and a fight starts, it is absurd for them to suggest that they are using these arms in self-defence. And people armed with lathis who go to support others armed with spears must be supposed to realise that in the confusion of a fight their companions' spears may inflict mortal injury, even though there be no positive desire of any single person to cause death."

This language is only consistent with the view that the accused were guilty of rioting and that the killing of Kanhaiya and the injuring of certain other villagers were incidents in the course of the riot and that the accused were jointly responsible, because the offences were committed by certain members of the riotous assembly, and were likely to be committed in the prosecution of their common object.

In such circumstances it is doubtful whether it could be held that the accused had by necessary implication been *acquitted* of the charge of rioting. For the appellants great reliance is placed upon the observations of their Lordships of the Privy Council in the case of *Kishan Singh* v. *King-Emperor* (1). In that case an accused person was charged under section 302 and was convicted under section 304 of the Indian Penal Code. The Local Government applied to the High Court in revision and the High Court accepted the application and directed that

(1) (1928) I. L. R., 50 All., 722.

the conviction of the accused should be altered to a conviction under section 302 and sentenced the accused to death. Their Lordships of the Privy Council held that the accused must be deemed to have been acquitted in the sessions court of the charge of murder, and that the order of the High Court resulted in altering the finding of acquittal to one of conviction, and that therefore the order was contrary to law.

In our opinion the present case can be distinguished upon the facts. In the case of *Kishan Singh* the accused had been charged with murder, and the trial court, in convicting him under section 304 of the Indian Penal Code, must be held to have acquitted him of the charge of murder by necessary implication even if it did not expressly record an acquittal under section 302. The learned Sessions Judge must have applied his mind to the question whether the accused was guilty of an offence under section 302 of the Indian Penal Code and must have come to the conclusion that he was not guilty of such an offence. In such a case no doubt it must be assumed that the trial court had acquitted the accused of the offence under section 302 of the Indian Penal Code.

The facts of this case are quite different. It is true that the learned Sessions Judge convicted the accused under section 304 only. He made no mention in his judgment, from beginning to end, of the other charges upon which the accused were being tried. But the whole trend of his judgment, as we have already shown, was that the accused were guilty of rioting. We think it would be wrong to hold that the accused had by necessary implication been acquitted of the offence under section 147 of the Indian Penal Code. The real fact seems to be that the learned Sessions Judge directed his attention exclusively to the principal charge under section 304 and failed to pay any attention to the charges of minor offences under sections 147 and 326. His findings amounted to a conviction under section 147 as well as

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under section 304. He merely omitted, probably by an oversight, to record a conviction under section 147 also. On this ground alone we think that this case can be distinguished from *Kishan Singh's* case (1).

Another reason why the ruling in *Kishan Singh's* case cannot be applied is that in that case the High Court were acting in exercise of their revisional powers under section 439 of the Code of Criminal Procedure. Their Lordships held that in exercise of *revisional* powers the High Court could not convert a finding of acquittal into a finding of conviction. There is no question in the present case of convicting the accused of the offence under section 302 of the Indian Penal Code after they have been acquitted of that offence. Nor are we sitting as a court of revision. We are sitting as a court of appeal, the accused having appealed against their conviction under section 304 of the Indian Penal Code, and the powers exercisable by us are powers under section 423 of the Code of Criminal Procedure. Under that section the High Court is entitled to alter the finding while maintaining the sentence. The question is whether the conviction under section 304 can be altered into a conviction under section 304 *read with section* 149 of the Indian Penal Code although the learned Sessions Judge has not recorded any conviction under section 147 and therefore might possibly be deemed to have acquitted the accused of that charge. On the merits we find it clearly proved that the appellants were guilty of rioting; and that, as mortal injuries were likely to be caused in the prosecution of their common object, they were also guilty of an offence under section 304 read with section 149 of the Indian Penal Code.

Numerous authorities have been cited which show that the trend of judicial opinion is in favour of the view for which the learned Government Pleader contends. He maintains that under section 423 of the Code of Criminal Procedure it is open to the High Court to convict under

(1) (1928) I. L. R., 50 All., 722.

section 147, although the trial court may have expressly acquitted the accused under that section, or may have merely failed to record an order either of conviction or of acquittal under that section. In support of this contention the following authorities have been cited: *Queen Empress* v. *Jabanulla* (1). In that case it was held that the appellate court can, under the provisions of section 423 of the Code of Criminal Procedure, in an appeal from a conviction alter the finding of the lower court and find the appellant guilty of an offence of which he was acquitted by that court. That was a case of converting an express acquittal into a conviction and their Lordships of the Calcutta High Court held that such a course was open to the High Court under section 423 of the Code of Criminal Procedure. The ruling goes farther than is necessary for the purpose of the present case where there is no express acquittal under section 147 but merely an omission to record a conviction under that section. This ruling was followed by a single Judge of this Court in *Emperor* v. *Sardar* (2). Here it was held that 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. The same view was taken by the Madras High Court in *Golla Hanumappa* v. *Emperor* (3) and again by a single Judge of this Court in *Janki Prasad* v. *Emperor* (4). The whole trend of authorities is in one direction and not a single case has been cited before us in which a dissentient view has been expressed. In our opinion the Privy Council ruling in *Kishan Singh's* case (5) does not shake the authority of the rulings cited, as it does not interpret the powers of an appellate court under section 423 of the Code of Criminal Procedure but interprets the revisional powers of the High Court under section 439 of the same Code.

(1) (1896) I.L.R., 23 Cal., 975. (2) (1911) I.L.R., 34 All., 115.
(3) (1911) I.L.R., 35 Mad., 243. (4) (1926) 96 Indian Cases, 215.
(5) (1928) I.L.R., 50 All., 722.

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Following these authorities, therefore, we hold that we are entitled to alter the conviction under section 304 to a conviction under section 304 read with section 149 of the Indian Penal Code. We accordingly do so. We think it unnecessary to record a formal conviction and to pass a concurrent sentence under section 147 of the Indian Penal Code.

As regards the sentences we think that the sentences passed upon Kishan Sarup and Bishan Sarup of eight years' rigorous imprisonment are not excessive. These two were clearly the ring-leaders. They were influential men and they were trying to extort subscriptions by force from certain villagers. They must have known that such objectionable and forcible methods would be likely to result in fighting and serious bodily injuries. We therefore dismiss their appeals.

As regards the other five appellants we think that the sentences are somewhat unnecessarily severe because they had no personal interest in collecting these subscriptions and they must have come as mere retainers of the two principal accused and were no doubt acting under their influence and orders. Moreover, the prosecution evidence does not show that they personally committed any specific acts of violence. We therefore maintain the convictions of these five appellants but reduce the sentences from six years' to three years' rigorous imprisonment.