

APPELLATE CRIMINAL

Before Mr. Justice Collister and Mr. Justice Braund

EMPEROR *v.* CHHADAMI*

Indian Penal Code, sections 443, 457—Lurking house trespass by night—Active steps to conceal his presence necessary for the offence.

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The mere fact that a house trespass is committed by night does not make the offence one of lurking house trespass. In order to constitute lurking house trespass the offender must take some active steps to conceal his presence.

The appellant appeared in person.

The Deputy Government Advocate (Mr. Sankar Saran), for the Crown.

COLLISTER and BRAUND, JJ.:—Chhadami has been convicted under section 457 of the Indian Penal Code on a charge of having stolen a pair of shoes from the verandah of a house. Having regard to his previous convictions and the fact that he was a registered member of the criminal tribes, under section 10B of the Criminal Tribes Act he has been sentenced to transportation for life. He appealed from jail to this Court and his appeal was admitted.

The facts as alleged by the prosecution are as follows. On the night between 25th and 26th December, 1938, one Sheo Singh was sleeping on a verandah or covered chabutra. He is the chaukidar of a man named Lala Badri Narain, a resident of Etawah, and this chabutra or verandah apparently forms part of his house. Sheo Singh says that he was roused from sleep by a slight noise and he jumped up in time to see a man running away with his shoes which had been underneath the charpoy. On his shouting that a thief was running off with his shoes, Bisal Singh and Gopi Nath came up. The three men then gave chase and in the meanwhile the head constable, who was on patrol duty with a couple of constables, came from the opposite direction and caught

*Criminal Appeal No. 368 of 1939, from an order of K. R. Damle, Sessions Judge of Mainpuri, dated the 6th of April, 1939.

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the appellant and searched his person and recovered Sheo Singh's shoes, which were wrapped up in a piece of cloth. Sheo Singh lodged a report at the police station at 3.30 a.m.

The evidence of Sheo Singh is corroborated by Gopi Nath and Bisal Singh. The former is a Sonar and the latter a Thakur.

The appellant's defence before the Magistrate was that he had been falsely implicated because he was an ex-convict. Before the Judge he said that Sheo Singh owed him Rs.5 and when he demanded payment Sheo Singh raised a hue and cry and said that the appellant had stolen his shoes.

No questions were put in cross-examination to any of the witnesses for the prosecution and no witnesses were called in defence. It is perhaps somewhat odd that the appellant should not have thrown away the incriminating shoes in the darkness when he saw that his capture was inevitable and it may seem a somewhat curious coincidence that this police patrol happened to be coming along at that particular moment, but there is no actual impossibility in either of these two circumstances and we can find no grounds for disbelieving the testimony of Gopi Nath and Bisal Singh who are *prima facie* independent persons and appear, in the absence of any cross-examination, to be witnesses of truth. Having regard to the state of the evidence, we have no option but to hold that the appellant did in fact steal this pair of shoes.

There remains the question as to whether or not he has been rightly convicted under section 457 of the Indian Penal Code. The charge against him was that he committed lurking house trespass by night with a view to commit theft, but we are not satisfied that his conduct, as it appears from the evidence, amounts to lurking house trespass. Section 443 of the Indian Penal Code provides: "Whoever commits house trespass, having taken precautions to conceal such house

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trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit lurking house trespass." In the present case there is nothing whatsoever on the record to show that the appellant took any precautions to conceal his act of house trespass from Sheo Singh. For aught we know to the contrary, the appellant may have been coming along that night, saw the chaukidar asleep on the verandah, seized his opportunity and snatched the pair of shoes from under the bed and then ran away, waking the chaukidar in the process. There is nothing to indicate that he took any active steps to conceal his presence. In the case of *Budha v. The Crown* (1), a man had entered the courtyard of a haveli through the *deorhi*, which had no door attached to it, and he was caught in the courtyard, his intention apparently being to commit theft of cattle. A Bench of the Punjab Chief Court held that lurking house trespass was not established. The learned Judges observed: "We do not think it can be said that the mere fact that a house trespass was committed by night makes the offence one of *lurking* house trespass. In order to constitute lurking house trespass we are of opinion that the offender must take some active means to conceal his presence." The conviction was accordingly altered to one under section 451 of the Indian Penal Code. We are in agreement with the view which was expressed in that case and since there is nothing on the record of the case out of which the present appeal arises to indicate that the appellant took any steps of any kind whatsoever to conceal the fact of his presence, his conviction under section 457 of the Indian Penal Code cannot stand. We accordingly substitute a conviction under section 451 of the Indian Penal Code.

There remains the question of sentence. Section 451 is not one of the sections in schedule I of the Criminal

(1) (1916) Punj. Rec. (Cr. J.) p. 55.

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Tribes Act and therefore section 23 of the Act is not applicable. The applicant is an old man of about sixty and the property which he stole consisted of a pair of old shoes worth a few annas. Having regard to these circumstances we are of opinion that a sentence of one year's rigorous imprisonment will meet the ends of justice.

In the result we alter the conviction to a conviction under section 451 of the Indian Penal Code and we reduce the sentence to one year's rigorous imprisonment. In other respects this appeal is dismissed.

APPELLATE CIVIL

Before Justice Sir Edward Bennet and Mr. Justice Verma

SARDAR SINGH (OPPOSITE PARTY) v. CHHOTY LAL
 (PETITIONER)*

1939
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District Boards Act (Local Act X of 1922), section 35C(1)—Question about validity of election of Chairman—Reference by Local Government to a District Judge for decision of the question—Persona designata—Not acting in his capacity as District Judge—No appeal lies from the decision—Bengal, Agra and Assam Civil Courts Act (XII of 1887), sections 3, 20.

No appeal lies from the decision by a District Judge of a question referred to him by the Local Government under section 35C(1) of the District Boards Act. In such cases the District Judge acts merely as a *persona designata* and not in his capacity of a District Judge.

Under section 20, read with section 3, of the Bengal, Agra and Assam Civil Courts Act an appeal can lie from the court of the District Judge, and not from the District Judge when not acting as a court.

Mr. *Shabd Saran*, for the appellant.

Mr. *Gopi Nath Kunzru*, for the respondent.

BENNET and VERMA, JJ.:—This is a first appeal from order brought by Chaudhri Sardar Singh against a decree of Mr. Hamilton passed on the 30th of March, 1937. Objection has been taken that no appeal lies to this Court. The appellant before us was elected as a Chair-

*First Appeal No. 167 of 1937, from an order of A. Hamilton, District Judge of Saharanpur, dated the 30th of March, 1937.