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zamindar's right was to a share of the purchase money, not merely a right to claim that share from the vendor; that it was, therefore, incumbent on the purchaser, if he wished to acquit himself of all liability, to see that the zamindar was satisfied in respect of his due, and that he could not discharge himself by a payment to the vendor. This decision was followed by STRACHEY, C. J., and BANERJI, J., in 1901 in the case of *Dhandai Bibi* v. *Abdul Rahman* (1). Lastly a Bench of the same Court, to which one of us was a party, took the same view of the zamindar's right in the case of *Kedar Nath* v. *Datta Prasad Singh* (2). The concensus of opinion and the weight of authority are, therefore, in favour of the plantiff's right.

Stuart, C. J. and Hasan, J.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Wazir Hasan and Mr. Justice A. G. P. Pullan

JADUNANDAN AND OTHERS *v.* KING-EMPEROR.*

1927 *July*, 29.

Criminal Procedure Code (Act V of 1898), section 162—Statements made before police investigating officer in his diary, whether could be used for contradicting witnesses in cross examination—Indian Penal Code (Act LXV of 1860), sections 323, 324, 304 and 326—Persons assisting to commit a murder and persons innocently going to the spot with murderer are guilty of offences actually committed by them.

Where several witnesses were confronted with statements which they made to the Police investigating officer, *held*, that the statements which were as a matter of fact attested by the Sub-Inspector concerned, although recorded in

* Criminal Appeal No. 174 of 1927, against the order of Jotendro Nath Basu, Sessions Judge at Unao, dated the 26th of March, 1927.

(1) (1901) I.L.R., 23 All., 209. (2) (1922) I.L.R., 44 All., 739.

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his diary were certainly recorded under section 162 of the Code of Criminal Procedure and, as such, they could be used for the purpose of contradicting witnesses in cross-examination and their use for this purpose is entirely in accordance with the provisions of the Code of Criminal Procedure.

If a number of persons assist a man to murder another, whether by themselves assaulting him or preventing his friends from assisting him, they are guilty of the same offence as was committed by the murderer, whereas if they merely went to the spot with some innocent intention and the murderer suddenly committed murder without their assistance and possibly contrary to their wishes, they can only be guilty of the offence, if any, which they themselves committed.

Messrs. *John Jackson*, *J. N. Misra* and *Ali Zaheer*, for the appellants.

The Government Pleader (Mr. *H. K. Ghosh*), for the Crown.

HASAN and PULLAN, JJ. :—This is one of those cases in which a quarrel between two brothers has resulted in the murder of one of them. The learned Sessions Judge has discussed the evidence in great detail and we are satisfied in general as to the correctness of his findings, both as to the incidents that led up to this crime and as to the manner in which it was committed. Jai Deo, the elder brother, wished to irrigate his field from a certain tank. In order to do this he had a channel prepared in the morning and he intended to commence irrigation by means of lifts on the following morning. His brother, Jai Kishan, hearing of this decided to forestall him by irrigating his own field from the same tank and apparently by means of the same channel at night. When Jai Deo heard of this he and his men went to the spot in the evening and commenced work. This was undoubtedly the cause of Jai Deo's death. It has been argued before us that Jai Kishan had a prior

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right to irrigate his field because it is situated in the same *mahal* as the tank, whereas the field of Jai Deo is situated in a different *mahal* It does not appear to us that this is a matter of importance. No evidence has been called for the defence and we cannot hold that it is universally true that irrigation is allowed only of those fields which are in the same *mahal* as the tank from which the water is taken or even that, in the case of brothers especially, the one whose field is situated in the same *mahal* as the tank has a prior right to his brother. The lower court has found that Jai Kishan and his men went to the spot, and one of them, Mahesh, inflicted severe blows on the head of Jai Deo with a *lathi* and caused his death, while others assaulted Jai Dayal, the younger brother of Jai Deo, and a man named Thanya, who is a *pasi* by caste, inflicting in each case very slight injury. As is general in such cases, the difficulty has been to ascertain who were the actual assailants. No report was made that evening, and it was not until the following evening that a brief report was made by the village *chaukidar* on information given by Jai Dayal.

As might be expected the name of Jai Kishan appears as the leading accused and his name is followed by that of his *karinda* Jadunandan. At that time Jai Deo had not died, but he died on the 28th of November, that is the day after the report was made, and on the 1st of December Jai Dayal made a statement to the police in amplification of the first report. Investigation proceeded in accordance with these reports, and there is no question that at the outset a very elaborate case was prepared. Jai Kishan who is a cripple, both of whose feet have been amputated, could not possibly take part in an assault with *lathis*. He was accordingly sent to the scene in his cart and he was naturally accompanied by two persons, one

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his *karinda* Jadunandan and the other a servant who is still absconding, named Mahabir. When he reached a spot in the *galiara* or lane close to where Jai Deo was working, Jai Kishan addressed his supporters and told them to kill the principals but spare the *riyaya*. It need hardly be said that such a statement is in the highest degree unlikely, and we would not have been surprised had the lower court rejected it on its face value had it been produced before him. As a matter of fact this case was not produced before him. Before the trial commenced it was ascertained that the lane was invisible from the place where the assault took place and the cart had to be taken out on to the fields. Witness after witness had committed himself in the police investigation to the story that the cart was in the lane, and in the trial they with one accord denied their statements to the police and told the new story about the cart being brought into the field. But they also made another material difference in their statements. While Jadunandan was with his master in the cart in the lane he could not take any active part in the affair, but now that the cart was brought into more prominence in the foreground it was possible for Jadunandan also to wield a *lathi*, and in the trial he was given an active part. The learned Judge appears to have missed this point. He saw that the witnesses could not be believed as to Jai Kishan, but he did not see that the case of Jadunandan must be identified with that of his master. In our opinion he too should have received the benefit of the doubt especially as the evidence that he took any part in the affair is of a most meagre nature, and it is impossible to assign to him any specific action which caused hurt to anybody.

We now come to that part of the judgment in which the learned Sessions Judge has more certainly

gone wrong. It is where he begins to discuss the nature of the exact offence committed by the five persons whom he has convicted. We are not directly concerned with the case of Mahesh, who has been sentenced to transportation for life under section 302 of the Indian Penal Code, and has preferred no appeal. As we have already said Jadunandan should be acquitted along with his master. Thus there remain only the cases of Sheo Adhar, Nandu and Sarju. The learned Judge says that he has no doubt that " destruction of human life was not the common object of the unlawful assembly which these persons formed along with Mahesh and Mahabir." He then goes on to find that Mahesh is guilty of murder and that the other persons whom he has convicted, although apparently they had the same common object as Mahesh, are not guilty of murder but of an offence either under section 304 or 326 of the Indian Penal Code. It appears to us that this view must be wrong. If these persons assisted Mahesh to murder Jai Deo, whether by themselves assaulting him or by preventing his friends from assisting him, they are guilty of the same offence as was committed by Mahesh whereas if they merely went to the spot with some innocent intention, and Mahesh suddenly committed a murder without their assistance, and possibly contrary to their wishes, they can only be guilty of the offence, if any, which they themselves committed. As none of them are said even to have assisted Mahesh, their offence must be that of assaulting either Thanya or Jai Dayal. Thanya was found by the police on the 4th of December, and the sub-inspector says that he showed him some injury; but he was never examined by any doctor and we are unable to say what injury, if any, he received. Jai Dayal had a bruise

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on the head and a slight cut on the finger. The persons who assaulted him could be guilty of no more grave offence than one under section 324 or 323 of the Indian Penal Code and we are unable to see how the learned Judge found any of these persons guilty of an offence under section 304 or 326.

Hasan and Pullan, JJ.

At this point we should consider an application made for revision of the order of the lower court on behalf of the relations of the deceased, asking us to enhance the sentences passed both upon Mahesh, who has not appealed, and upon the appellants. Such applications are rarely made and should not, in our opinion, be encouraged. It is the part of the Crown, not of individuals, to ask courts to enhance sentences passed upon criminal offenders. The point made by the learned Counsel who appears for the relatives of the deceased is, that on the Judge's finding the appellants were members of an unlawful assembly along with Mahesh, and they should be convicted of the same offence as Mahesh, namely an offence under section 302 of the Indian Penal Code, and he has asked us to consider that this is a case in which a capital sentence should have been inflicted. It is true, as we have said above, that that is the logical result of a portion of the learned Judge's judgment, but we notice that he has not convicted any of these persons of the offence of rioting, and he has apparently considered that, although they were with Mahesh, they did not actually join in the attack upon Jai Deo. We are not disposed to dissent from this view of the case, and we accordingly cannot accede to the application for enhancement of sentence on the appellants before us, and in the case of Mahesh we consider that this was entirely a matter for the Crown and not one in which we are prepared to hear a private individual. In our opinion Jadunandan should not have been convicted

for the very reasons given by the lower court for acquitting Jai Kishan, and, on the view that the other appellants can only be convicted of the offence which they had individually committed, Sarju, who in any case is only a lad of 18 years of age, should also be acquitted. Nobody says that Sarju committed any assault on anybody and Sarju admits his presence on the spot and makes what appears to be a straight-forward statement showing that he saw the assault and ran away. As to the others there is no doubt that they were present and it is they who assaulted Jai Dayal and probably Thanya. It may be that they took a much more serious part in the affair, but that is the case as it has been presented. In our opinion their offence is one under section 323 of the Indian Penal Code, and they should be sentenced without regard to the fact that their companion Mahesh murdered Jai Deo.

Hasan and Pullan, JJ.

In this appeal a point of law was raised on the part of the Crown which we consider should be briefly answered. In the lower court as we have stated above several witnesses were confronted with statements which they made to the investigating officer. It has been argued on behalf of the Crown that these statements were wrongly admitted in evidence in that they were not statements recorded under section 162 of the Code of Criminal Procedure, but that they were part of the investigating officer's diary. In our opinion the statements which were, as a matter of fact, attested by the sub-inspector concerned, although recorded in his diary, were certainly recorded under section 162 of the Code of Criminal Procedure, and, as such, they could be used in the manner in which they have been used by the lower court. They were not admitted in evidence, but they were used for the purpose of contradicting witnesses in cross-examination, and their use is entirely in accordance with the provisions of the Code of Criminal Procedure.

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For the reasons above stated, we allow the appeals of Jadunandan and Sarju and declare them to be acquitted, and we find Sheo Adhar and Nandu guilty of offences under section 323 of the Indian Penal Code, and reduce their sentences to one year's rigorous imprisonment each.

Hasan and Pullan, JJ.

Appeal partly allowed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra.

1927
August, 5.

JODHA (DEFENDANT-APPELLANT) *v.* DARBARI LAL (PLAINTIFF-RESPONDENT).*

Oudh Rent Act (IV of 1921), section 48—Hindu law—Collaterals of a Hindu widow, who are—Widow, when can her collaterals be considered to be her heirs under section 48 of the Oudh Rent Act—Sub-tenant's tenancy comes to an end on principal tenant's death—Landlord, whether bound to issue notice of ejectment against sub-tenant on death of principal tenant.

A collateral of the husband of a Hindu widow must be deemed in Hindu law to be also her collateral.

If such a collateral did not share in the cultivation of the holding with her at the time of her death he cannot be considered to be her heir under section 48 of the Oudh Rent Act. [*Sheo Dutt* v. *Ram Manorath* (1), referred to.]

The tenancy of a sub-tenant comes to an end on the death of the principal tenant, and it is not necessary for the landlord to issue a notice of ejectment against the sub-tenant.

Mr. *Ram Bharosey Lal*, for the appellant.

Mr. *M. Wasim*, for the respondent.

MISRA, J. :—This is an appeal arising from a suit in which the plaintiff-respondent claimed possession of a certain holding situate in village Kundwara,

* Second Civil Appeal No. 221 of 1927, against the decree of Shēo Narain Tewari, First Subordinate Judge of Bahraich, dated the 9th of April, 1927, reversing the decree of Gauri Shankar Varma, Munsif of Bahraich, dated the 19th of January, 1927.

(1) (1926) 3 O.W.N., 1006 : Selected Decision of United Provinces Board of Revenue, No. 7 of 1926.