APPELLATE CRIMINAL.

1930 December 17.

Before Mr. Justice Muhammad Raza and Mr. Justice A. G. P. Pullan.

GHAFOOR KHAN (APPELLANT) v. KING-EMPEROR (COMPLAINANT-RESPONDENT).*

Criminal Procedure Code (Act V of 1898), section 417—Order of acquittal—Case against persons in a lowly position in life—Addition of names of more substantial persons—Acquittal by Sessions Judge of persons added—Indian Penal Code (Act XLV of 1860), section 436—Arson—Incalculable damage to innocent persons—Sentence in a case of arson.

It is not the practice of the Oudh Chief Court to interfere with an order of acquittal unless the judgment of the court below is manifestly wrong. In such cases the Chief Court is loath to interfere and only does so if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds.

It is a matter of common knowledge that in this country a man who has a good case against persons in a lowly position in life adds as a matter of course in his complaint the names of more substantial persons and if this is the view on which a Sessions Judge has acted, it cannot be said that he had no reason for applying that line of argument to the case before him and it cannot, therefore, be considered that the ground for acquittal is unreasonable so as to justify interference.

Arson in an Indian village is a crime which cannot be too heavily punished as it causes incalculable damage to innocent persons who can ill afford to lose the little property that they possess and in such a case a sentence of 3 to 5 years' rigorous imprisonment cannot be reduced.

Dr. *Qutubuddin Ahmad* and Mr. *H. G. Walford*, for the appellant.

The Government Advocate (Mr. *H. K. Ghose*), for the Crown.

RAZA and PULLAN, JJ.:—Three appeals have been filed against a decision of the Additional

* Criminal Appeal No. 412 of 1930, against the order of I. M. Kidwai, Additional Sessions Judge of Bahraich, dated the 16th of August, 1930.

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Sessions Judge of Bahraich in a case brought under section 436 and 452 of the Indian Penal Code. The learned Sessions Judge convicted two out of six persons who were tried by him. These persons Ghafoor and Mahabir have appealed separately against their convictions which were under section 436 in the case of Ghafoor and 452 in the case of Mahabir. The learned Additional Sessions Judge has sentenced Ghafoor to five years' rigorous imprisonment and to pay a fine of Rs. 100 and he has sentenced Mahabir to three years' rigorous imprisonment and to pay a fine of Rs. 100. A third appeal has been filed by the Local Government against the acquittal of the four other persons charged, namely, Riasat and Jumman who were charged only with the offence under section 452 and Durga Prasad Singh and Damodar Prasad who were also charged with the abetment of an offence under section 436. There is no doubt that an incident occurred in the village of Gangwal on the 6th of February, 1930, on or before noon in which certain servants of the Gangwal estate were implicated on the one side and a family of Muhammadans on the other. The Muhammadan family consists of three brothers Bandhu, Alla Bakhsh and Chandu. According to the first report, which was made by Chandu at 5 p.m. at the police station of Payagpur about four miles from Gangwal the quarrel arose in the following manner. Riasat and Jumman, who had obtained over the head of Bandhu a contract for the collection and sale of honey from the Gangwal estate, came to Bandhu's house accompanied by Mahabir and Ghafoor both of whom are described as *sipahis* of the estate and wanted to take Bandhu to the Taluqdar of Gangwal. Bandhu was not at home. His brother Alla Bakhsh and his son Pathera had an altercation with these persons and Alla Bakhsh in the course of a fight hit Mahabir on the head. At this point Bhaiya Bajrang Singh, who

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is the heir to the estate, Durga Prasad Singh the *naib* of the estate, and an unnamed estate inspector and another *sipahi* came up with guns. The inspector and the *naib* gave orders for the beating of these persons and the taking of Bandhu and when Bandhu did not come out Durga Prasad Singh, *naib*, told them to set fire to the house. Thereupon Ghafoor set fire to the house with a match. Four thatches were burnt. After the report of Chandu a report was also made by Mahabir in which he said that he had received a blow on the head with an axe and had then gone to tell his master but had unfortunately left his *chadar* behind and when he went to get it he saw Bandhu set fire to his own house. This Mahabir refused to go to hospital to have his injuries seen. Chandu on the other hand had certain injuries which were seen by a doctor. It appears that Mahabir after his refusal made a small wound in his head with a knife and had himself inspected three days later. The case depends entirely on whether the evidence given by the witnesses for the prosecution is to be believed or not Admittedly the police had some difficulty in conducting the investigation. They obtained no help from the Gangwal estate and found witnesses, particularly those of Gangwal village, most reluctant to come forward. They however appear to have followed the clue given by Chandu in his report and to have examined a man known as Lal Pande of Jaiswara and some other men of that village. They also obtained the evidence of one witness in the village of Tikri and these persons have been sent up to support the case put forward by Chandu and his family. According to the prosecution case Bandhu, who was examined as a witness was not present when his house was set on fire. The learned Additional Sessions Judge has believed in the main the evidence of the prosecution witnesses but he has come to the conclusion that this

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is a case in which the complainant tried to make out that the estate authorities took a leading part in the affair when in all probability what was done was merely the act of two irresponsible estate *sipahis*. It is because the learned Judge has taken this view that the Local Government has appealed and we are asked to believe that the evidence against Durga Prasad Singh and Damodar Prasad is at least as strong as the evidence against the other persons who were charged along with them and that they should be regarded as having instigated the crime. As to Riasat and Jumman the case for the Crown is that they were undoubtedly present, entered the house illegally and should have been convicted under section 452 of the Indian Penal Code. Mahabir and Ghafoor plead that the counter case set up by Mahabir in his report is correct and that Bandhu set fire to his house in order to manufacture a false case against the Gangwal estate. The learned counsel for Ghafoor further suggests that in any case his client was merely a tool and he should not be severely punished for obeying the orders of his master, but this line of defence is somewhat in conflict with that put up by Durga Prasad Singh and Damodar Prasad.

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We shall consider first the appeals of Mahabir and Ghafoor. We can see no reason whatever for supposing that Bandhu set fire to his own house. Admittedly there was a strong west wind blowing and a person who sets fire to a thatch in a village is doing a very dangerous thing which is bound to cause great loss to himself and probably to his neighbours. The witnesses who deposed to this story are all creatures of the Gangwal estate and we consider that their evidence has been rightly rejected by the learned Judge. We have no doubt whatever that in the main the prosecution story is a true one. That the Gangwal estate authorities are concerned is proved by the fact that they gave no assistance to the police and that

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they produced such witnesses for the defence. But when we go beyond the case of Mahabir and Ghafoor, who, in our opinion, have been rightly convicted, we tread upon different ground. These other persons have been acquitted after a fair trial by a Sessions Judge, who agreed with the opinion of all his assessors. He has given in his judgment the reasons for taking the view that he has taken. He does not think it likely that Riasat and Jumman would have gone to the house of Bandhu on this occasion and he considers that they were the very persons whom Bandhu or his brother would accuse falsely because they were the persons who had taken the contract for the collection of honey over the head of Bandhu. This is a perfectly sound reason for acquitting these persons and it is difficult for us to interfere with such an order. Moreover it is nowhere alleged that these persons committed any serious offence. It is indeed doubtful whether they committed any offence. When they entered the house along with Mahabir and Ghafoor there is nothing to show that they had any illegal intention and the evidence proves that no assault was committed by more than one man and it is not even alleged that these persons had anything to do with setting fire to the house. Under the circumstances we have no hesitation in saying that we cannot interfere with the order of acquittal passed in their case.

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As to Damodar Prasad he is able to show that although known to the parties he was not mentioned by name in the first report. A perusal of that report indicates that it was prepared with a view to future developments. Bhaiya Bajrang Singh is brought in such a way that he might either be charged with participation in the crime or he might be regarded as a spectator and the person called the estate inspector might easily be made to mean some one else and not Damodar Prasad. When the first information report

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was prepared in this manner the court is apt to suspect that the name has been suppressed pending inquiries as to whether some particular person was present who can be made to fit in with the description. This man Damodar Prasad produced an *alibi* but this apparently did not impress the learned Judge favourably. He has been acquitted rather on the general ground that he has been named as a leading man in the estate who was not really present. This is even more the case with Durga Prasad Singh. This Durga Prasad Singh is an old man who is the *naib* or manager of the estate. Clearly he is the sort of person who would be named in a case of this kind by an unscrupulous complainant. The learned Judge thinks that this is such a case. He also appears to believe the *alibi* which this man set up, namely that he spent the day of the 6th of February in a civil court at Bahraich. There is certainly documentary as well as oral evidence to show that this man was at the court in Bahraich on the 6th of February and the learned Judge who after all is the best judge of such facts believes that it was impossible for him both to be at Bahraich and to be at Gangwal when this crime was committed. There is nothing on the record which the learned counsel for the Crown has been able to set against this opinion of the learned Judge and we are left to suppose that the distance between Gangwal and Bahraich could not have been compassed by the accused between the alleged time of the burning of Bandhu's house and his appearance in the Court of the Subordinate Judge.

Lastly we have to consider the fact that it is not the practice of this Court to interfere with an order of acquittal unless the judgment of the court below is manifestly wrong. We need not go so far as some of the rullings which have discussed this point, notably that reported in *Empress of India* v. *Gayadin and*

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another (1) which would confine all cases of decision on facts in which the court should interfere to those where, through the incompetence, stupidity or peversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. We would merely say that in such cases this Court is loath to interfere and will only do so if it is proved without any doubt not only that the accused person is guilty but that he has been acquitted on unreasonable grounds. We cannot consider that in the present case the ground for the acquittal of these persons is unreasonable. It is indeed a matter of common knowledge that in this country a man who has a good case against persons in a lowly position in life adds as a matter of course in his complaint the names of more substantial persons. This is the view on which the learned Judge has acted and we cannot say that he has no reason for applying that line of argument to the case before him.

We accordingly dismiss the Government appeal and uphold the order of acquittal of Riasat, Jumman, Durga Prasad Singh and Damodar Prasad. As to the sentence imposed upon the other appellants we consider that it is right to pass a substantial sentence of imprisonment. Arson in an Indian village is a crime which cannot be too heavily punished as it causes incalculable damage to innocent persons who can ill afford to lose the little property that they possess. We cannot therefore reduce the sentence of imprisonment passed upon Mahabir and Ghafoor. On the other hand we do not wish to punish other persons for their folly. It cannot be supposed that they would pay the fines inflicted and we therefore set aside in each case the order of fine and the imprisonment imposed in default. In other respects the appeals of Ghafoor and Mahabir are dismissed. Riasat and Jumman are

(1) (1881) I. L. R., 4 All., 148.

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in jail. They will be at once released. Durga Prasad Singh and Damodar Prasad are on bail. Their bail bonds will be discharged.

Appeal dismissed.

APPELLATE CIVIL.

1930 December, 23.

Before Mr. Justice Muhammad Raza and Mr. Justice Bishcshwar Nath Srivastava.

MANTOORA, MUSAMMAT AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* THAKUR JAGMOHAN SINGH AND ANOTHER (PLAINTIFFS) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Lease—Mortgagor's power to grant a perpetual lease—Lease impairing the security of the mortgagee—Mortgagor executing lease in favour of his wife after mortgagee has obtained sale from him, validity of—Evidence of witnesses —Trial Judge's verdict on evidence of witnesses, value to be attached to—Fraud—Circumstantial evidence how far sufficient to establish fraud.

Held, that a mortgagor cannot grant a perpetual lease so far as it impairs the security of the mortgagee and affects prejudicially his rights as such.

Where a perpetual lease of a portion of the mortgaged land was executed fictitiously and fraudulently by a mortagagor without the mortgagee's knowledge and consent in favour of his wife, *held*, that it was invalid as against the mortgagee who had obtained a sale deed of the entire mortgaged property from the mortgagor in full satisfaction of the mortgages held by him. *Qurban Ali and another* v. *Seth Raghubar Dayal and others* (1), and *Musammat Bibi Saidunnissa* v. *Faiyaz Hasan and others* (2), relied on.

Held further, that when the issue is simple and the only question is which set of witnesses is to be believed, the verdict of the trial Judge, who has seen and heard the witnesses and

* First Civil Appeal No. 27 of 1930, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Rae Bareli, dated the 17th of December, 1929.

(1) (1912) 15 O. C., 239. (2) (1922) 9 O. L. J., 319.