

APPELLATE CRIMINAL.

Before Coutts and Das, J.J.

RAM PRASAD SINGH

v.

KING-EMPEROR.*

1922.

June, 15.

*Penal Code, 1860 (Act XLV of 1860), section 149—Riot—
one member of unlawful assembly convicted of murder, whether
others may be convicted constructively of causing culpable
homicide not amounting to murder.*

Where the principal offender in a case of rioting is convicted of an offence the others cannot be held to have committed constructively an offence different from the offence found to have been committed by the principal offender.

Therefore, where the principal offender was convicted under section 302, held, that the others could not be convicted under section 304 read with section 149.

The facts of the case material to this report are stated in the judgment of Coutts, J.

Gour Chandra Pal, for the appellants.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown. *

COUTTS, J.—This is an appeal by nine persons, Ram Prasad Singh, Daroga Singh, Pearey Singh, Rhuso Singh, Misra Singh, Tilakdhari Singh, Tarni Singh, Nemdhari Singh and Lalit Singh who have been convicted under sections 302 and 148 of the Indian Penal Code and sentenced to transportation for life under section 302; the other appellants have been convicted under sections 304/149 and 147 of the Penal Code, and sentenced to five years' rigorous imprisonment each under the former section and they have also been directed to pay a fine of Rs. 100 each.

The facts of the case as alleged by the prosecution are shortly as follows: About one and half *prahars*

* Criminal Appeal No. 71 of 1922, from convictions and sentences passed by G. J. Monahan, Esq., Sessions Judge of Monghyr, dated the 5th April, 1922

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before sun-rise on the 23rd of October last, one Daroga Singh had gone to see his *kelai* field. When he got there he found one Ajwa Gowala grazing five buffaloes belonging to the appellants, Ram Prasad Singh and Bhuso Singh. He at once attacked Ajwa and was beginning to drive the buffaloes to the pound when Ajwa raised an outcry whereupon the appellants with Ramadhin and Gudar Singh ran up and surrounded Daroga. Ram Prasad had a spear in his hand and with it he struck Daroga Singh in the chest, Daroga Singh fell down and the rest of the appellants who were armed with *lathis* ran away. Some persons who were nearby camp up and took away the bamboo shaft of the spear which was sticking in Daroga Singh's chest leaving the spear point in it. Some of them then took Daroga to his home and from there to the *thana* which is ten miles away. His first information was taken at the *thana* at about 9 a.m. and the Sub-Inspector then took him to Gogri hospital where he recorded his dying declaration at about 11-15 a.m. The spear head was then extracted by the doctor but Daroga died shortly afterwards at about 11-20 a.m. The body was then sent to Monghyr and the *post-mortem* examination showed that death was due to shock and hæmorrhage from the injuries to the chest wall and the lung.

The accused persons set up a counter case alleging that Daroga had been killed during a fight at a hut belonging to Ajwa where Daroga had gone with ten or twelve men during the night for the purpose of looting. No evidence has been adduced in support of the defence story and the learned Sessions Judge has entirely disbelieved it.

To establish the prosecution case the evidence of the prosecution witnesses, Jagrup Singh, Kishori Singh and Mahabir Singh, has been relied on. Jagrup's evidence is to the effect that at the time of the occurrence he was looking after his buffalo which was grazing in a *gachhi* near by and he saw the whole occurrence which he describes very much in the same way as I have already stated it. Kishore Singh and

Mahabir Singh depose to the same effect and they say they saw the occurrence because they were out watching their field which was close by.

If we believe the evidence of these witnesses, as the learned Sessions Judge has done, there can be no doubt that the prosecution case has been fully established. But we have been asked to disbelieve the evidence on account of various circumstances. It is urged that it is curious that the accused persons should have arrived on the spot as soon as Ajwa called out, and that they should have been armed—Ram Prasad with a spear and the rest with *lathis*. It is also suggested that rather than attack Daroga who had gone to take the cattle to the pound they would have rescued the cattle and taken them off. It is further pointed out that there were no blood marks at the place of occurrence, that there were several injuries on Ajwa although the prosecution case is that he was only struck twice with a *lathi*, and that there was a denial by the prosecution witnesses that Ajwa had a hut in the neighbourhood.

I am unable to find such improbabilities in these circumstances as would lead me to disbelieve the prosecution evidence in the case. So far as the arrival of the accused persons as soon as they were called by Ajwa is concerned, this is not at all improbable because it was getting towards dawn, Daroga himself had gone out and it is not unlikely that the rest of the accused persons were also beginning to go about their usual business. So far as attacking Daroga rather than rescuing the cattle and taking them away is concerned, it seems to me quite probable because natural anger against Daroga for taking the cattle to the pound would lead the accused to attack him knowing that after he had been disposed of the cattle could be taken away also. The matter of no blood marks having been found has been discussed by the learned Sessions Judge. He says that it is quite possible that any blood which flowed from the wound was soaked up in Daroga's *dhota* as he subsided on the ground in

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a sitting posture. Moreover one of the police officers has stated that soon after the occurrence he found that the ground at the place of the occurrence had been dug up and it is not at all impossible that the accused persons dug up the ground in order to do away with traces of blood. With regard to injuries on Ajwa it is true that the doctor who examined him seven days after the occurrence has found five injuries on his person most of them being merely abrasions. We do not know how he got these small abrasions, but he did not necessarily get them when he was struck by Daroga and it is no part of the prosecution case that he did. Such abrasions are common and are received in the natural course of daily life. The mere fact, therefore, that five injuries on Ajwa's person were described by the doctor in no way contradicts the prosecution case or supports the defence case, that there was a fight in Ajwa's house in the course of which he was struck. So far as the hut is concerned it is true that the prosecution witnesses have denied that there was a hut, but the hut appears to be of a very insignificant character, it is not a permanent structure and the fact that it is not mentioned is not of much consequence.

It has next been urged that the witnesses on whose evidence the convictions have been based should not be believed. The prosecution witness No. 1 Jagrup is an old man and so it is urged he would have been unlikely to be out tending his buffalo at such an early hour and as to the other accused persons it is contended that it is not likely that they would be watching their crops at that hour. I am unable to accept any of these contentions. Jagrup was looking after one buffalo only and although he is an old man and somewhat decrepit it is just the sort of work that such an old man would do and it is not at all improbable that he should be out at that particular hour. So far as the criticism of the evidence of the other witnesses is concerned I see no reason to suppose that they would not be out watching their crops. Crops are watched at night and it would be an usual thing for these

witnesses to be watching their field at that hour. So far then as the evidence of these witnesses is concerned I see absolutely no reason why it should not be believed. I am prepared to accept it and if it is accepted the prosecution story has been fully established.

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The question remains as to what offences the appellants are guilty of and what sentences should be passed on them. So far as Ram Prasad is concerned there cannot be the slightest doubt that he is guilty of murder, he attacked a defenceless man with a spear which he drove into his chest. The learned Sessions Judge does not consider that it was necessary to inflict the extreme penalty of the law and although the case is on the border line I see no reason to differ from his view on this point.

There remains the question of the other appellants. There can be no possible doubt that these accused persons are guilty of the offence of rioting with the intention of assaulting Daroga who was driving to the pound cattle belonging to Ram Prasad and Bhuso, but it has been urged that their conviction under section 304/149 cannot be sustained and, with this view, I am inclined to agree. Section 149 of the Indian Penal Code runs as follows :

" If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in the prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

That is to say, any member of an unlawful assembly is in the circumstances contemplated by section 149, constructively guilty of the same offence as that which is committed by one of its members. In the present case Ram Prasad has been found guilty under section 302. The learned Sessions Judge has found that the rest of the appellants cannot be held to be constructively guilty under section 302 but he has found that they are constructively guilty under section 304. I can find no authority, however, for convicting the principal offender of one offence and the rest of the

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members of the unlawful assembly of another offence, nor has the learned Assistant Government Advocate been able to refer us to any such case, and it seems to me clear from the section itself that if a member of an unlawful assembly is to be found constructively guilty of an offence under section 149 it must be the same offence of which the principal is guilty and not some other offence. If the members of an unlawful assembly are not guilty of the same offence as the principal the only reason why they are not guilty is because they do not come within the terms of section 149. If then the rest of the appellants are not constructively guilty of the same offence as Ram Prasad they cannot be found guilty under section 149 at all. This being so they must be acquitted of the offence under section 304/149. They are, however, guilty under section 147, and under this section I would sentence them to rigorous imprisonment for two years each. In the result then the appeal of Ram Prasad is dismissed and the appeals of the other appellants are allowed to this extent that their convictions and sentences under section 304/149 are set aside but they are convicted under section 147 and sentenced to rigorous imprisonment for two years each under this section.

DAS, J.—I agree.

Order modified.

APPELLATE CRIMINAL.

Before Coutts and Das, J.J.

JAGDEO SINGH

v.

KING-EMPEROR.*

Hostile witness—question in nature of cross-examination put to prosecution witness by prosecutor, admissibility of—duty of Court.

* Criminal Appeal No. 98 of 1922, from a conviction and sentence passed by J. F. W. James, Esq., Sessions Judge of Shahabad, dated the 18th May, 1922.

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