

1927.
 GENDO
 URAON
 v.
 KING-
 EMPEROR.
 ALLANSON, J.

assembly was to assault the public servants. The persons actually assaulting could also be sentenced under section 353. In the present case the assault on the public servants was not the common object of the unlawful assembly. The assault took place later; but from the evidence it is clear that it was done in furtherance of the common intention of the mob and each of the accused is liable under section 353/34. As was remarked in the above case, the question is rather an academic one, as the sentences passed could have been given under section 147 only.

The aggregate sentences are not excessive. The assaults on the Excise officers, the interference with their work, and the destruction of the evidence of illicit distilling that had been detected were quite unjustifiable. The occurrence was of a serious nature and the work of Excise officers would be brought to a standstill and their persons endangered, if they were liable to be attacked with impunity by a large body of aboriginals when they go to make searches in a village.

The application is rejected.

SEN, J.—I agree.

Rule discharged.

APPELLATE CRIMINAL.

Before Allanson and Sen, JJ.

CHHANKA DHANUK

v

KING-EMPEROR*.

Penal Code, 1860 (Act XLV of 1860), sections 147 and 351—Unlawful assembly—common object charged "to assault" certain persons—whether the charge covers hurt—Code of Criminal Procedure, 1898 (Act V of 1898), sections 224 and 231—alteration of charge—right of accused to have prosecution witnesses recalled for cross-examination.

*Criminal Appeal no. 87 of 1927, from a decision of J. G. Shearer, Esq., I.C.S., Additional Sessions Judge of Bhagalpur, dated the 23rd March, 1927.

Where the offence alleged to have been committed by the members of an unlawful assembly in furtherance of their common object is hurt, whether simple or grievous, it is sufficient to state in the charge that the common object of the members of the unlawful assembly was "to assault" the persons to whom hurt was caused. It is not necessary to state that the common object was to cause simple or grievous hurt, as the case may be.

Where a charge is altered or added to, however unnecessary and misconceived the alteration may be, the court is bound to recall any witness whom the prosecution or the accused desires to examine with reference to the alteration or addition.

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

Fazl Ali (with him *N. C. Roy*), for the appellants.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

ALLANSON, J.—The two appellants have been convicted under sections 302/149 and 148 I. P. C. by the Additional Sessions Judge of Bhagalpur agreeing with two out of four Assessors and have been sentenced to transportation for life.

Jagarnath Chaudhuri is a big raiyat of village Morsanda. For sometime before the occurrence which took place on the 10th of November 1924, Jagarnath had been on very bitter terms with Santokhi Potdar, the 8-anna malik of the village. In April 1924 an order was issued under section 144 of the Code of Criminal Procedure against both parties, but it was set aside by the District Magistrate. Santokhi was convicted in a riot case, but was acquitted on October 30th 1924. On the 1st November, 1924, Jagarnath filed a petition before the District Magistrate, alleging that Santokhi was hiring lathials to take possession of the disputed land. Two days later the chaukidar reported that lathials had appeared in the

1927.

CHHANKA
DEANUK
v.
KING-
EMPEROR.

1927.

CHHANKA
DHANUK
v.
KING-
EMPEROR.

ALLANSON, J.

village, and the Sub-Inspector asked for proceedings under section 144. Meanwhile a constable was sent to the village a day or two before the occurrence.

The prosecution story is that on the night of the 9th November there were nine persons sleeping in Jagarnath's temporary hut at Morsanda. There is only a small basti in this village, and big non-resident cultivators put up these temporary huts for cultivation purposes. The above nine persons included two nephews of Jagarnath Chaudhuri, a brother-in-law of Jagarnath's brother, several servants and labourers and a stranger named Bharosi Kurmi who was spending the night there. In the morning before sunrise a large body of men, led by Santokhi Potdar and Banku Kumar on horseback attacked the inmates of the hut. They were armed with deadly weapons. Bharosi was transfixed with a spear thrust and died shortly after the occurrence. A boy 11 years old was brutally murdered with spear thrusts, three other persons received serious injuries and two slight injuries. The constable arrived on the spot after the rioters had departed. The rioters carried away with them the body of the boy which was found next day in a sack buried in the mud of a shallow stream $2\frac{1}{2}$ miles from the place of occurrence. Mahadeo Chaudhuri, one of Jagarnath's nephews, started for the thana, but hearing on the way that the Sub-Inspector was at Chanda, four or five miles away, he went there and gave his first information to the writer head constable at 9-30 a. m. The writer head constable then proceeded to the village and found the seriously injured persons lying in the kamat house. The first information contains the names of ten accused persons including the two appellants. The police did not send up a charge sheet, as the evidence was regarded as insufficient and suspicious. Further inquiry was ordered by the learned Sessions Judge on the 1st April 1925. There was a judicial inquiry and a charge sheet was called for on the 26th June 1925. Only Santokhi surrendered, and he was tried and

acquitted on the 29th March 1926. In the trial, out of which the present appeal arises four persons were charged, two of whom have been acquitted.

There can of course be no doubt that a very serious outrage took place that night at the kamat house. The sole question for decision is whether the appellants were identified as among the rioters. Certain general considerations have to be borne in mind. There was the bitterest of enmity between Santokhi and Jagarnath. It had been reported that Santokhi was collecting lathials, and there must be grave suspicion that Santokhi was behind the occurrence of that night. It is true that there had been dacoities in the neighbourhood before and after that day, but it is improbable that ordinary dacoits would have raided a temporary hut like this where there are no valuables or if they had done so would have made such savage attacks on a number of persons and have succeeded in carrying off only property worth Rs. 8. On the other hand Jagarnath's party would, whether or not they did recognise their assailants, have attributed the occurrence to Santokhi and his men. One of the difficult points in the case is the hour. The first information gives the hour as "morning before sunrise". It is light for sometime before actual sunrise, but nowhere is it stated whether it was light or dark. The constable says that he was awakened by the hulla at about 4-15 a.m. He said in a previous trial that it was dark and misty, and one could not see two yards in front. The learned Sessions Judge says that in the present case there has been an attempt by the prosecution witnesses to put the hour later than it really was. The fact remains that it is impossible to ascertain whether the occurrence took place before it was light. The learned Sessions Judge says that it is improbable that an indiscriminate and murderous attack would have been made in this way in a hut of this description unless it was light, as the attacking party might injure each other. Moreover some of the head injuries show that it was light enough for the

1927.

CHHANKA
DHANUKv.
KING-
EMPEROR.

ALLANSON, J.

1927.

CHHANKA
DHANUK
v.
KING-
EMPEROR.

ALLANSON, J.

assailants to see where they were striking. These reasons however are not decisive as to the hour and visibility. Santokhi would know that the occurrence certainly would be attributed to him and his men. Yet a large body of his men arrive at early dawn without any pretence at concealment, and make a murderous attack. One of the remarkable incidents in the case is the carrying away of the dead or dying boy. Even though the country over which the murderers would go was jungly, it is extraordinary that in day light they should have embarrassed themselves with the body of the boy. It is said that they presumably carried away the body in order to do away with it, yet they had left on the spot several men very seriously injured, one of whom died shortly afterwards. The body is said to have been found next day as the result of clues dropped by the rioters. It is unnecessary to say anything more about this incident.

Five persons have identified the appellants. The evidence of identification by two of them, the informant Mahadeo Chaudhuri and Hardut Chaudhuri, both of whom are nephews of Jagarnath Chaudhuri, has been discarded by the learned Sessions Judge. I agree with him that both these persons were in the village that night. I am not sure that either of them was at the kamat house. Jagarnath Chaudhuri was conveniently easing himself when the mob came, and so he hid behind a bush, which afterwards becomes a patch of khur grass, 100 feet or more from the house. The learned Sessions Judge says rightly that he could have identified nobody from that distance, the morning being misty. Hardut Chaudhuri says he succeeded in escaping from the house and hiding behind a bush, which bush (like his brother's bush) does not seem to have existed in reality. He had no injuries. The constable says that Hardut told him that he was out attending his buffaloes at the time that the occurrence took place. Hiya Lall (P. W. 6) is a brother-in-law of Jagarnath's brother whose servant he is. He received only slight injuries

and says he hid behind some grass. He named both the appellants. Meghu Dusadh, who is also a servant and who was seriously injured, says the appellant Rahim assaulted him with a pharsa on the head. Before the police he could not say who assaulted him. He does not identify the other appellant. P. W. 9, another servant, identifies the appellant Chhanka Dhaunk but does not identify Rahim. He says he saw Chhanka strike Bharosi; he did not tell the police that; for some unexplained reason, this witness was only tendered for cross-examination and it was left to the Court to bring out his examination in chief. He was an important witness, and should have been examined by the prosecution. The position therefore is that the informant, who says that he identified the appellants and eight other persons has been disbelieved. The other nephew of Jagarnath has also been disbelieved, and there remains the evidence just referred to, of three servants. Santokhi has already been acquitted in a previous trial. In the present trial two other persons named in the first information have been acquitted. The two persons convicted are both peons of Santokhi. Therefore of the five persons out of ten named in the first information who have been tried, three have been acquitted. The learned Sessions Judge has pointed out at some length the various improvements made in the prosecution story and the difficulties of the case. I have already said that the occurrence would at once be attributed to Santokhi and his people. I see that in the report of the Sub-Inspector dated the 13th April, 1924, asking for section 144 proceeding against both the parties, the names of both appellants appear in the list of Santokhi's party. I doubt whether the occurrence took place in circumstances in which there could have been an identification. I believe it took place when the people in the kamat house were asleep. It is almost certain that the first informant did not see the occurrence or at any rate identify anybody. In all the circumstances of the case, it would be, in

1927.

CHHANKA
DHAUNK
v.
KING-
EMPEROR.

ALLANSON, J

1927. my opinion, very unsafe to convict either of the present appellants.

CHHANKA
DHANUK
v.
KING-
EMPEROR.

ALLANSON, J.

It is necessary to comment on a legal point that was taken in appeal. One of the common objects of the unlawful assembly as given in the charge was to assault the inmates of Jagarnath Chaudhuri's kamat house. At the argument stage the defence pointed out that under the provisions of section 224 of the Code of Criminal Procedure the word "assault" could only be taken to have the meaning that it bears in section 351 of the Indian Penal Code. The learned Sessions Judge thereupon amended that part of the charge to "voluntarily causing hurt". When the defence asked to be allowed to recall the witnesses, the learned Sessions Judge refused on the ground that the defence could not show on what points further cross-examination was necessary. In the first place I would point out that any alteration of the charge was unnecessary. The charge was quite correct. It is the usual form of charge when the common object is to do violence to some person. It is immaterial whether the offence to commit which there was a common object was assault, simple hurt, or grievous hurt. In such circumstances it is quite sufficient to say that the common object was to assault a person or persons. But once a charge has been altered or added to the provisions of section 231 apply. The learned Sessions Judge was bound to recall any witness which the prosecution or the accused desired to examine with reference to the alteration or addition. I agree that it is difficult to see what further questions could have been asked, but the provisions of the section are peremptory.

The appeal is allowed and the convictions and sentences of the appellants are set aside and they must be released.

SEN. J.—I agree.

Appeal allowed.