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with propriety be said that the evidence would have warranted a different verdict, then we must hold real trial by jury is absolutely at an end and that the verdict of the jury is of no more weight than the opinion of assessors," *Queen* v. *Sham Bagdee* (1). In the present case it was unexpected that the jury should have returned a verdict of guilty by a majority of four to one. But the jurors are entitled to their own view of the case and the rule of law is not to disturb their verdict unless it be for special reasons and under special circumstances. The principle underlying that rule is well expressed as follows: "We adhere generally to the principle notwithstanding our large discretionary powers first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature, and secondly, because any undue interference may tend to diminish the responsibility which it is desirable that a jury should cherish ", *Reg* v. *Ghanderav Bajirav* (2).

The appeal must be dismissed and the convictions and sentences affirmed.

ALLANSON, J.—I agree.

REVISIONAL CRIMINAL.

Before Allanson and Sen, JJ.

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June, 29.

GENDO URAON

v

KING-EMPEROR*.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 142, 147 *and* 353—*unlawful assembly, liability of members of—Burden of proof—separate convictions under section* 147 *and* 353.

A person who intentionally joins or continues in an unlawful assembly is liable to conviction under section 142 of

*Criminal Revision no. 348 of 1927, from an Order of G. Rowland, Esq., I.C.S., Judicial Commissioner of Chota Nagpur, dated the 21st May, 1927, affirming an order of K. C. Ritchie, Esq., Subdivisional Magistrate of Chatra, dated the 17th February, 1927.

(1) (1873) 13 Ben. L. R. 19. (2) (1876) I. L. R. 1 Bom. 10.

the Penal Code, and if he pleads that he was there innocently, or merely as a harmless spectator, he must prove that he was there owing to no fault of his own and that he could not get out of the crowd.

Where the common object of the members of an unlawful assembly was to compel Excise officers to abandon the search of certain houses and, after this object was achieved, some of the members proceeded to assault the officers, *held*, that there could be no doubt that the assault was made in furtherance of the common intention of the assailants and, therefore, that they were liable to be convicted not only under section 147 but also under section 353/34.

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

Sir Ali Imam (with him *B. C. De*) for the petitioners.

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

ALLANSON, J.—The 21 petitioners have been convicted under sections 147 and 353/34 of the Indian Penal Code and sentenced to six months' rigorous imprisonment under each section, the sentences to run consecutively. The petitioner Gendo has also been fined Rs. 50.

On the 5th November, 1926, an Excise Inspector and Sub-Inspector with a number of Excise subordinates went to make house searches for illicit liquor and illicit distilling apparatus in village Haphua. The accused, who are all Oraons, belong to this village. The houses of Gendo and Mirwa accused were searched and also the house of one Dukhi, and illicit liquor or distilling apparatus were found in each of these houses. While the search was going on in the house of the accused Somra there was an alarm, and a mob of 40 or 50 men started smashing and removing the articles which had been already attached and which had been left in charge of an Excise Head Constable. The Excise Inspector and his men remonstrated, but they were attacked by the excited mob and nine of them were injured and the whole party had to run away. The only names that could

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be given in the first information were those of the persons whose houses had been searched. But at subsequent test identifications a number of persons, including the present petitioners, were, indentified by various members of the Excise party.

ALLANSON, J. The prosecution witnesses who were not previously acquainted with the petitioners were not in a position to say what overt act each person did, that is which of them smashed the handis or which of them struck which of the excise party. They could only identify them as among the rioters. The learned Judical Commissioner on appeal ignored the evidence of two witnesses, who in their depositions merely said that at the test identification they identified certain persons. This was really a faulty record by the Magistrate. The witnesses ought to have said that they identified these persons as among the mob. No defence witnesses were examined.

Sir Ali Imam on behalf of the petitioners urged that as the occurrence took place in the village, and as the Excise officers were picketing certain houses and not allowing egress and ingress, the villagers, must have been looking on, and no one can be convicted unless an overt act is proved against him. I find no evidence or suggestion that among a crowd of onlookers certain persons suddenly formed an unlawful assembly. The smashing of the handis and the subsequent attack on the Excise officers was, according to the evidence, the work of a number of men. Moreover in an occurrence of this kind, in which the witnesses did not know from before the persons taking part, but were only able to pick them out at a subsequent test identification, clearly it would be the persons nearest to the witnesses who would be likely to be identified. It would be curious if, instead of identifying as among the rioters those persons whom they really saw in the unlawful assembly, the prosecution witnesses should have picked out innocent onlookers who would presumably be at some distance. Any person who,

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when the smashing of the handis began, intentionally joined or remained in the unlawful assembly was a member of that unlawful assembly. Such a person could not help being aware that the action of those men was unlawful. Any person who has innocently got into a crowd and is unable owing to pressure of numbers to escape from it, of course is not a member of the unlawful assembly; but he would have to make out his case on that point. There is no question here of such a crowd that innocent onlookers could not get out of it. No one who intentionally joins or continues in an unlawful assembly can be allowed to say that he was merely a harmless spectator. He must prove that he was there owing to no fault of his own and that he could not get out of the crowd. The whole object of the provisions of section 142 of the Penal Code would otherwise be defeated. There is nothing to show that any of the accused were innocent onlookers or that the witnesses have identified as rioters persons who were merely looking on. None of the accused pleaded he was an innocent onlooker.

The other point argued on behalf of the petitioners is that they have really been convicted twice over for the same offence. But the common object of the unlawful assembly was to compel by criminal force the Excise officers to stop the house searches, and this was effected by smashing up the handis, etc. When the Excise officers expostulated with the rioters, they proceeded to attack them. The common object of the unlawful assembly was not to assault the officers, but the occurrence subsequently developed into such an assualt. There can be no doubt that the assaults were made in furtherance of the criminal intention of the accused, namely, to drive away the Excise officers. It was held in *Prokash Chandra Kundu* v. *Emperor* (1) which was also an Excise case, that separate convictions are legal under sections 147 and 353, even when the common object of the unlawful

(1) (1914) I. L. R. 41 Cal. 836.

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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.

1927.

June, 29.

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.