REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

1927.

March, 7, 8.

NATHUNI NONIA

v.

KING-EMPEROR.*

Jury, Trial by—charge to jury—misdirection—suggestion by judge of an alternative aspect of the case not put forward by prosecution or defence—charge—addition to common object orginally stated—jury not asked which object proved, whether amounts to misdirection.

Where the petitioners were charged with rioting with the common object of looting the paddy stored in the khalihan in a certain basti, and this was denied by the accused persons, one of whom had lodged a saneha at the thana from which it appeared that the complainant's party might have attacked the party of the petitioners in a khesari khet belonging to the petitioners and situated a quarter of a mile away from the khalihan, *held*, that it was not a misdirection on the part of the judge to suggest for the jury's consideration, as a third alternative, an intermediate state of facts, namely, that the party of the accused having been worsted by the complainant's party at the khesari khet fled into the basti, and, having reinforced themselves there, advanced to meet the other side near the khalihan.

Banga Hadua v. *King-Emperor* (1), distinguished.

Samaruddi v. *Emperor* (2), followed.

Where the common object of the unlawful assembly of which the petitioners were members was originally stated in the charge to be "to loot the paddy crops lying in the khalihan" and, after some of the witnesses for the prosecution had been examined, the judge added to the charge the words " and to assault the landlords' man Karu Gope and others ", *held*, that the charge as amended did not state two alternative

*Criminal Revision no. 78 of 1927, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Patna, dated the 27th January 1927, affirming the decision of P. L. Sen, Esq., Assistant Sessions Judge of Patna, dated 1st October, 1926.

(1) (1910) 11 Cal. L. J. 270. (2) (1913) I. L. R. 40 Cal. 867.

common objects and, therefore, it was not necessary for the judge to ascertain from the jury as to which part of the common object they found the petitioners guilty of.

Samaruddi v. *Emperor* (1), followed.

The Assistant Sessions Judge of Patna, in agreement with the verdict of the majority of the jury, convicted the petitioners Ajodhya Dubey, Dhanukdhari Dubey, Nathuni Dubey, Jehal Mahton, and Nathuni Nonia under section 148 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment and two and a half years' rigorous imprisonment under section 304; Mosafir Dubey and Thakur Nonia were sentenced to six months' rigorous imprisonment under section 148 and to one year's rigorous imprisonment under section 304 read with section 149; the rest of the petitioners were sentenced to four months' rigorous imprisonment under section 147 and to one year's rigorous imprisonment under section 304 read with section 149.

It appeared that there was trouble between the landlords of village Basta and their tenants. In August, 1925, the tenants, including some of the petitioners, filed applications for commutation under section 40 of the Bengal Tenancy Act, and then in November of the same year the landlords filed applications for division of the crops under section 69 of the Bengal Tenancy Act. In January, 1926, the tenants wanted to remove the crops and both sides were preparing to use force when the Sub-Inspector visited the village. In spite of the Sub-Inspector's warning, the tenants removed crops from 2 bighas of the land and the Magistrate issued notices under section 144 of the Criminal Procedure Code, both against the landlords and the tenants. An amin was deputed to get the crops reaped and stored in a khalihan in village Basta.

It happened that several of the tenants had transferred portions of their holdings to others without

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the consent of the landlords, and, when the landlords made applications under section 69, they named the original tenants as the persons against whom they proceeded, ignoring those who had purchased portions of the holdings. The result was that the original tenants, against whom applications had been made under section 69, at the instigation of the landlords took advantage of the fact that they had been named as tenants and sought to take the crops which had been grown by those to whom they had sold a portion of their holdings.

On the 21st March, 1926, the petitioner Tota Nonia went to the police-station at Chandi and gave information that Chakauri Nonia, who had sold $1\frac{3}{4}$ bighas to him 10 or 12 years before, was now preventing him from reaping the khesari crop at the instigation of the amla of the landlord, and was making preparations to fight.

On the 22nd March, 1926, at 9-30 A.M. Ganesh chowkidar gave information at the police-station similar in effect to that given by Tota the day before. He said that the amin had got paddy cut and stored in the khalihan, and that Chakauri and another went to Tota's khesari field to cut the crop and Tota Nonia obstructed him; men were being collected by Tota and lathis were being carried by both sides.

The case for the prosecution was to the effect that when the amin and a daffadar and chowkidar and three watchmen were at the khalihan a mob of some 200 or 250 men advanced to the khalihan from Basta village and proceeded to remove bundles of the crops stored there. Karmu Goala, one of the watchmen, obstructed them, and thereupon the petitioner Ajodhya Dubey gave orders to beat the watchman and thereupon the petitioners Jehal Kurmi, Nathuni and Dhanukdhari struck Karmu on the head with swords; he ran away and was pursued and fell near a siris tree 40 paces north-west of the khalihan, and there Ajodhya speared him in the stomach with a bhala and Nathuni speared

him with a barcha on the body and others of the mob also struck him. Karmu's brother Karu remonstrated and thereupon he was struck with a sword by Nathuni. Karu fled and went towards the police-station. He met the Head Constable at a place called Bhatahar and lodged information.

After injuring Karmu and Karu, the mob dispersed. Karmu died from the injuries he received and Karu was seriously injured. The Head Constable sent information to the Sub-Inspector and himself proceeded to Basta where he arrived at 12-30 P.M. and found paddy scattered outside the khalihan and brickbats inside and outside. He found blood leading from the khalihan to the siris tree. Karmu was hardly conscious and died sometime afterwards. At about 5-30 P.M. the Head Constable found Gopal Nonia and Bairo Nonia injured, and Gopal made a statement to the Head Constable to the effect that that morning Chakauri Nonia with others had come to cut Tota's khesari and had threatened to beat them when Chakauri caught Tota by the wrist and began to drag him. Gopal and Bhairo went up and remonstrated. Thereupon the gomashta of the landlord brought a mob of 100 to 125 men from the north-east and gave orders to beat Tota. In the mob Gopal recognised Karmu and Karu Goala. The mob ran to beat Gopal and Tota, and so they fled towards the basti to the south of the field chased by the mob. In the field of Badhu Nonia, the mob caught up Gopal, and Chakauri assaulted him with a lathi, while Jodha Nonia also beat him with a lathi. The mob then took away bundles of khesari. An investigation was held and the police sent up the 13 petitioners and others for trial on the information given by Karu.

In the original charge drawn up against the accused, so far as the offence of an unlawful assembly was concerned the common object was stated to be to loot the paddy crops lying in the khalihan for division under section 69 of the Bengal Tenancy Act. After

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examining seven or eight witnesses the Assistant Sessions Judge made an addition to the charge with the words

"and to assault the landlord's men Karu Gope and others."

The petitioners produced no evidence in defence other than the saneha (Exhibit A) which had been lodged by Tota on the 21st of March.

After hearing all the evidence, the jury by a majority of 3 to 2 found the petitioners guilty under the sections I have mentioned above. An appeal was made to the Sessions Judge of Patna on the ground that there had been several misdirections in his charge to the jury by the Assistant Sessions Judge. The Sessions Judge, however, found that in none of the points put forward was there any misdirection and he dismissed the appeal.

S. Sinha (with him *A. L. Nandkeolyar*), for the petitioners.

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

8th March 1927.

ADAMI, J. (after stating the facts set out above, proceeded as follows):

Mr. Sachchidananda Sinha has confined himself before us to three points on which he urges that there has been a misdirection to the jury.

His first point is that the Assistant Sessions Judge in charging the jury placed before them an absolutely hypothetical case not warranted by the evidence on record and thus misled the jury. It is to be noticed that the prosecution evidence made no mention of any occurrence on the field of Tota Nonia; it was the prosecution case that the petitioners and others had come in a mob up to the khalihan to loot the paddy and get back their crops and also to assault Karu and others. After pointing out that many witnesses had given evidence that the mob advanced from the Basta basti and came up to the khalihan and

thereafter the assault commenced at the khalihan, the learned Assistant Sessions Judge charged the jury to the following effect:—

"In this connection you should look to the defence story appearing from the evidence of the Writer Head Constable, the First Information Report Ext. 13, the statement of Gopal Nonia and the written statement in the record. You will consider whether a reading together of all these documents does or does not show that Tota Nonia and his party being worsted by the party of Chhakauri Nonia at the 3 kathas plot of khesari khet represented by the figure 4 in the plan fled into the basti, and whether the same does or does not indicate that thereafter they reinforced themselves in the basti and advanced to meet the other side. If you accept as true the prosecution evidence on the point you will be in a position to say that the assailants advanced from the basti to the place of occurrence. You will however have to consider what the immediate occasion was for the said advance of the mob. The defence suggests that the assault on the said Karmu was the sequel to the looting of khesari by Chhakauri Nonia with the aid of the landlord's men from plot no. 229 represented by the figure 4 in the plan. The evidence on the side of the prosecution also goes to show that an incident preceeded the advance of the mob towards the khalihan."

Later on the learned Assistant Sessions Judge said—

"If you find that the said Chhakauri Nonia, with the help of the landlord's men, not only removed the khesari from the above plot but assaulted the men of Tota Nonia, you will have to consider whether the party of Tota Nonia would calmly submit to or highly resent the high-handedness of their opponents and would at the earliest opportunity gather their supporters and advance to teach the said opponents a sound lesson."

Now Mr. Sinha objects that it is no part of the prosecution case that there was an occurrence on the field of Tota a quarter of a mile north of the khalihan, nor is there any evidence that, after such occurrence, the petitioners went to the basti and came back to wreak vengeance, and therefore the case made out by the learned Assistant Sessions Judge is a creation of his own mind and hypothetical. That being so, he was wrong in putting that case to the jury and thus misled them.

The case of *Banga Hadua* v. *King-Emperor* (1) is relied on by Mr. Sinha. There it was laid down that in cases of rioting it often happens that the court may consider that the story told by the prosecution is

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false in some of its details but is nevertheless sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution and was never suggested to the accused as being the case they had to meet.

Now in that case it was found that the story put forward by the prosecution must be false because it was found that the prosecution party were not in possession of the land as they claimed. The Sessions Judge in that case formed an alternative case that there was not one riot but two riots and that at first the decree-holders went out and drove out the judgment-debtors, and that subsequently the judgment-debtors, assembled in large numbers and attacked the other side. Stephen and Carnduff, JJ., found that this second story was altogether unsupported by evidence and had never been put forward by the prosecution.

The present case, however, is a different one. Here there was material before the court and before the jury to show that there may have been an occurrence on Tota's field a quarter of a mile away. The court had before it the information given on the 21st March and also the information given by Gopal Nonia on the 22nd. There was also the report of the Chowkidar Ganesh Prasad given on the 22nd at 9-30 A.M., as also the statement of the petitioner Tota Nonia in court. The evidence also showed that the mob had come up from the Basta basti; and according to the learned Assistant Sessions Judge no paddy was looted from the khalihan. It was then necessary to find some motive for the mob having attacked the men at the khalihan. It cannot be said that there was nothing to support the case suggested by the Assistant Sessions Judge to the jury, and I cannot see that the jury were in any way misled by the suggestion. The prosecution had carefully avoided mentioning this previous occurrence in Tota's field, for it would seem that two

men had been injured and naturally the prosecution witnesses would not like to admit having caused those injuries.

As against the case relied on by Mr. Sinha, we have the later case of *Samaruddi* v. *Emperor* (1). There it was held that the Judge was not wrong in asking the jury to consider as an alternative case an intermediate state of facts, namely, that the comlpainant's party went to turn the accused's party out of possession, was resisted and driven back, and that the latter then followed after and assaulted the former. The case put forward there was very much like the case put forward here. Chitty and Richardson, JJ., referred to the case of *Banga Hadua* v. *King-Emperor* (2) and also the cases of *Queen* v. *Sabid Ali* (3) and *Wafadar Khan* v. *Queen-Empress* (4) and distinguished them.

The learned Assistant Sessions Judge in this case left it open to the jury whether they would accept the suggestion he made, and it cannot be held that, if the suggestion was not accepted, the prosecution case must fail. In my opinion the Assistant Sessions Judge has made a very fair charge to the jury and the suggestion he made was a suggestion which would occur to the mind of any person who heard the facts put forward by either side. In my mind, there is no misdirection to the jury on this point.

The next point urged by Mr. Sinha is that the petitioners were sent up on a charge of an unlawful assembly with the common object of looting paddy stocked in the khalihan and that the addition of the words " and to assault Karu and other persons in the khalihan " amounted to an alternative charge. As the Assistant Sessions Judge did not put to the jury the question on which of the two common objects they found the petitioners guilty and did not direct them to find which common object actuated the mob there was a misdirection. He urges that the Assistant Sessions Judge was still influenced by his theory that

(1) (1913) I. L. R. 40 Cal. 367. (2) (1910) 11 Cal., L. J. 270.
(3) (1873) 20 W. R. C. 5. (4) (1894) I. L. R. 21 Cal. 955.

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the first occurrence was on Tota's field, then there was a return to the basti followed by the attack on the khalihan, such attack being made in vengeance for what had happened on Tota's field; and it was owing to this theory that the addition was made to the charge. He points out that there was not sufficient evidence to show that the assault happened inside the khalihan, or that paddy had been looted, and therefore also it was necessary to make the addition to the charge. He was leading the jury to discard the charge of loot and believe the charge of assault and he ought to have put it definitely to the jury to come to a finding what the actual common object was.

Mr. Sinha speaks of the additional words in the charge as an alternative charge; but in this he is not correct, for the words were not " or to assault " the landlord's men but " and to assault" it was not in fact an alternative charge.

The case on which Mr. Sinha relies, *Wafadar Khan* v. *Queen Empress* (1) is a case of a very different nature. There the common object originally stated in the charge was

" to use criminal force on Mir Azad and his party ".

Thereafter the words

" or else to punish Khan Ghalib for having enticed the wife of one Sher Ali "

were added. It was obvious that the common object added there was an absolutely unconnected common object and it was an alternative common object. In the present case the assault would be made as part of the transaction of looting the crop.

The case of *Samaruddi* v. *Emperor* (2) may again be referred to. There the common object originally stated in the charge was to take forcible possession of the complainant Panda's land and hut. Afterwards the words " and to assault Pandab, Jojdeb, Chandra Kishore and Karam Ali " were added. It was held that the addition in no way vitiated the

(1) (1894) I. L. R. 21 Cal. 955. (2) (1913) I. L. R. 40 Cal. 367.

trial, nor was there any misdirection. One common object was alleged throughout and it could not be suggested that the accused did not know exactly what they had to meet. There is no force in the contention of Mr. Sinha that it was the duty of the Judge to find from the jury on which common object they were depending.

The learned Assistant Sessions Judge clearly pointed out to the jury that even if the common object as to loot could not succeed, there still remained the common object to assault. He stated to the jury,

"You will have to determine whether the object of the assembly was to loot crops and assault the landlord's men or the one or the other. In any case you will have to say that the object was illegal."

He also said,

"You will consider whether the mention of the first information Ex. 7 of the alleged looting of paddy crops from the khalihan may not be due to this circumstance that the mob advanced to the vicinity of the khalihan. The evidence shows that, as a matter of fact no crops whatever were taken away and that the marpit did not take place within the khalihan.

He further stated,

"I should tell you that there are two limbs in the common object as put forward by the prosecution, and that, if you find that one of the said limbs has not been, but the other has been, made out, that will suffice. What I mean to say is this that if you find that the allegation that the mob advanced to loot the crops gathered at the khalihan is not proved, but that if at the same time you find that the object of the mob was to assault the landlord's men, you will have to say that the mob was actuated by an illegal object."

In my opinion the learned Assistant Sessions Judge put the position very clearly and well to the jury and the objection cannot succeed.

The last point put forward by Mr. Sinha is that the theory formed by the Assistant Sessions Judge influenced him in charging the jury with regard to the right of private defence and that he still suggested to the jury that the purpose for which the mob advanced to the khalihan was to wreak vengeance for what had happened in Tota's field.

The learned Assistant Sessions Judge explained what the right of self-defence is to the jury and

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pointed out that if the story of the prosecution that the mob advanced to the khalihan to commit assault was believed, the petitioners could not fall back upon the plea of the right of private defence and he pointed out that there was no evidence on the record to show that the assault took place on plot 229 which is Tota's field. He stated to the jury that the evidence was that no blood marks were found in Tota's field. Mr. Sinha points out that it was never the defence case that the assault took place on Tota's field, the defence case was that the assault was in the field of Budhan Nonia which is not so far from the khalihan. I cannot see that this makes much difference. There was no evidence to prove that an assault happened in the field of Budhan Nonia though blood was found there; no defence evidence was called. What the learned Assistant Sessions Judge told the jury was that the defence had failed to prove that any assault had happened when they were defending their rights. It was pointed out by the learned Assistant Sessions Judge that there was no evidence to prove that the men of Tota Nonia followed Chakauri and his party and that in the course of the pursuit the assault took place. It is true that the prosecution does not explain the finding of blood in Budhan's field, but that does not help the defence to show that they had a right of private defence. It is true that we have sanehas and informations given by Gopal, Ganesh and Tota but those alleged occurrences are not proved by evidence and the learned Assistant Sessions Judge was quite right in directing the jury that there was no evidence to prove the right of self-defence.

I can see no good reason to find that the learned Assistant Sessions Judge, who delivered a very careful and explicit charge to the jury, misdirected the jury in any way.

I would, therefore, reject the application.

SCROOPE, J.—I agree.

Rule discharged.