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TIKAIT KRISHNA PRASAD v. BUDHAN MANJHI.

MACPHERSON, J.

present to assist the appellant. In *Thakurain Jagarnath Kuari* v. *Latu Choudhri* (1) it was held on a construction of the sanads that they did not confer any permanent right. It was either not set up or not established by the evidence that the tenancy was in origin a cultivating or reclaiming tenancy in which occupancy rights would be inherent. These decisions, it is to be observed, were all given in first appeal where the facts were open to the Appellate Court. In *Lochan Pathak* v. *Mohammad Kasim* (2) the order of remand indicates that when a claim is raised that occupancy rights accrue by operation of law, it has to be met by the plaintiff who seeks a declaration that the entry is wrong.

This appeal is without merits and I would dismiss it with costs.

KULWANT SAHAY, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Tarrell, C. J. and Adami, J.

1928.

April, 25.

BHONDU DAS

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 34, 146, 149 *and* 326—*charge under section* 326 *read with section* 149—*conviction under section* 326 *read with section* 34, *whether bad in law.*

Where the accused persons were charged and convicted by a Magistrate for an offence under section 326 of the Penal Code read with section 149, but on appeal the Sessions Judge altered the conviction to one under section 326 read with section 34,

*Criminal Revision no. 146 of 1928, against a decision of F. F. Madan, Esq., I.C.S., Sessions Judge of Patna, dated the 31st January, 1928, modifying an order of Babu Pandey Ramchander Sahay, Deputy Magistrate of Behar, dated the 5th January, 1928.

(1) F. A. 66 of 1921 (unreported). (2) S. A. 27 of 1921 (unreported).

Held, that the conviction was not bad by reason of the absence of a specific charge under the latter sections.

Barendra Kumar Ghosh v. *Emperor* (1), *Government of Bengal v. Mahaddi* (2), *Abhiram Jha* v. *King-Emperor* (3) and *Queen* v. *Ramjirav Jivbajirav* (4), followed.

Panchu Das v. *Emperor* (5), *Reazuddi* v. *King-Emperor* (6), *dissented from*.

In considering the legality of the conviction in such circumstances the test is whether the facts which it was necessary to prove and on which evidence was given on the charge upon which the accused was actually tried are the same as the facts upon which he was convicted.

M. Yunus, for the petitioner.

Manohar Lal (for Assistant Government Advocate), for the Crown.

COURTNEY TERRELL, C.J.—This is a case which gives rise to a question of some considerable interest. But quite shortly the point is this:—The petitioners were convicted by the Magistrate under section 326 read with section 149 of the Indian Penal Code. The Sessions Judge has acquitted the petitioners of any circumstance which could bring the case within section 149 and he has convicted the petitioner Bhondu Das under section 326 read with section 34 and the question is whether in the absence of a specific charge in the original charge under those sections the petitioners have been rightly convicted.

The circumstances out of which the case arose may be briefly stated as follows:—There are two contiguous plots of land owned respectively by the complainant and the petitioners and adjoining those two contiguous strips is a third plot the possession of

(1) (1925) I. L. R. 52 Cal. 197, P. C.
(2) (1880) I. L. R. 5 Cal. 871.
(3) (1910-11) 15 C. W. N. CCXLIV (noted).
(4) (1875) 12 Bom. H. C. R. 1.
(5) (1907) I. L. R. 34 Cal. 698.
(6) (1911-12) 16 Cal. W. N. 1077.

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which has been the subject of dispute between the complainant and the petitioners but it has been found as a fact that the rightful possession of the disputed plot is in the petitioners. On the day of the occurrence in question the complainant and some of his party were engaged in sowing masuri on the disputed plot. The petitioner no. 1 Bhondu Das, accompanied by some 50 members of his party among whom were the other accused persons arrived upon the disputed plot with the object either of inducing the complainant to leave the plot or in the event of resistance to their persuasion driving them away by force. The petitioner and many of his party were armed with garasas and some carried lathis. The petitioner addressed the complainant telling him not to plough the disputed plot which he (the petitioner) said belonged to him. The complainant claimed the field as his own and refused to leave. Thereupon the petitioner ordered his party to assault the complainant. The petitioner's party obeyed the order and the complainant and has party were subjected to blows, some with garasas and some with lathis. In the end four injured men of the complainant's party lay on the field after which the petitioner and his party left.

The magistrate found that the disputed plot was in the possession of the complainant and convicted the petitioner no. 1, Bhondu Das under section 148 and section 149 read with section 326 of the Indian Penal Code and sentenced him to eighteen months' rigorous imprisonment and under section 106 ordered him to execute a bond and find sureties. He convicted the petitioners nos. 2, 3, 4, 5, 7, 8, 9 and 10 under section 326 read with section 148 and sentenced them to eighteen months' rigorous imprisonment. The petitioner no. 11 was convicted under section 324 read with section 148 and was sentenced to nine months' rigorous imprisonment and petitioner no. 6 was convicted under section 323 read with section 147 and sentenced to six months' rigorous imprisonment.

The petitioners appealed to the Sessions Judge who found that the disputed land was in the possession of the petitioner no. 1 Bhondu Das and his party and held that the charges under sections 147, 148 and 149 must consequently fail as the assembly constituted by them had a lawful common object, that is to say the defence of their property. He however convicted the petitioner no. 1 Bhondu Das under section 326 read with section 34 and expressed the view that his conduct went far beyond the right of private defence. He, however cancelled the order to execute a bond and find sureties. The other petitioners sentenced by the magistrate to eighteen months' regorous imprisonment were similarly convicted and their sentences maintained and the learned Sessions Judge allowed the appeal of two of the convicted persons on grounds which need not be mentioned here.

As regards the petitioner no. 1, Bhondu Das, who has been convicted under section 326 read with section 34 Mr. Yunus has strongly argued that since he could not be convicted under section 326 read with section 149 it was equally clear that he could not be convicted under section 326 read with section 34. He argued that the words "common intention" in section 34 had much the same meaning as the term "common object" in section 146 which is incorporated by implication in the word "rioting" in sections 147 and 148 and is used again in section 149 and since the Sessions Judge has held that the common object of the assembly was lawful and the words "common intention" in section 34 are synonymous with "common object" that the conviction under section 326 read with section 34 cannot stand. The words "common intention" in section 34 have however not the same meaning as "common object" in sections 146 and 149. The object of an assembly as a whole may not be the same as the intention which several persons may have when in pursuance of that intention they perform a criminal

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act and it may well be that the object of the assembly was lawful whereas the intention common to those of the assembly who jointly committed a criminal act was in itself criminal and the joint criminal act must be equally imputed to all of them. In the case of *Barendra Kumar Ghosh* v. *Emperor* (1) Lord Sumner in delivering the judgment of the Privy Council said this:—"There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of section 34, is replaced in section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all." Then at page 216 he says this:—"If section 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether." I may pause there to say that it is that view that section 34 referred only to the mere simultaneous doing in concert of identical criminal acts which prevailed until the decision of Lord Sumner in this case. Lord Sumner then went on to say "If the appellant's argument were to be adopted, the Code, during its early years, before the words 'in furtherance of the common intention of all' were added to section 34, really enacted that each

(1) (1925) I. L. R. 52 Cal. 197, P. C.

person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words expressed all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. This got rid of questions about principals in the first or the second degree by ignoring them, and the object of the framers of the Code was attained. In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the conditions under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section. Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done, in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words 'a criminal act' means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence."

Mr. Yunus further referred to the case of *Panchu Das* v. *Emperor* (1). In that case four persons accused under section 325 read with section 149

(1) (1907) I. L. R. 34 Cal. 698.

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were acquitted of an offence which could bring section 149 into operation and it was held that they could not be convicted of the substantive offence inasmuch as there had been no separate charge of the substantive offence in the Sessions Court under section 325 and a re-trial was directed. The learned Judges on this point said:—"The offences with which the accused were charged were rioting and culpable homicide and causing grievous hurt not by themselves but through others by virtue of section 149 of the Indian Penal Code. If the evidence recorded by the committing magistrate shewed that the accused or any of them inflicted hurt or grievous hurt with their own hands, or abetted by instigation or conspiracy the infliction of such hurt, additional counts of charge for those offences should have been added in the Sessions Court. But since the charge, which the Sessions Judge himself says was drawn up in a confused manner, was not amended before or during trial, the accused could be convicted only of the offences charged or any other offences covered by the offences charged under the provisions of sections 236, 237 and 238 of the Criminal Procedure Code. We do not think that under any reasonable construction of those sections it can be said that the offences of causing grievous hurt is minor to, or included in, a charge under section 325 read with section 149 of the Indian Penal Code. On this ground therefore, as well as on the other legal grounds noted above, we must hold that the conviction of the appellants cannot be sustained." An examination of the facts of that case as reported shews that the deceased had visited a brothel and met with injuries there from which he died some days later. His dying declaration which was held by the Court to have been improperly admitted stated that he had been severely beaten by the accused four persons. There was no evidence of a common intention nor any evidence of the part played by any of the accused persons, nor of the part played by all of them in concert if there was any concert and in the light of those facts it was rightly

held that there was no evidence to justify a conviction under section 325 for the substantive offence. In the case before us, however, another set of circumstances exists. The evidence which was given under the charge based upon section 326 read with section 149 is directly relevant to the issues under section 326 read with section 34. It has been proved that the accused Bhondu Das being present and armed with a deadly weapon gave an order to other persons armed with deadly weapons to assault the complainant. It is true that there is missing the element of an unlawful common object in the assembly as a whole which would be required to convict the accused persons under section 326 read with section 149 but the accused formed an assembly within a wider assembly which smaller assembly had a common intention to cause grievous hurt and the complainant suffered injury at their hands. All the necessary ingredients for a conviction under section 326 read with section 34 were present before the magistrate and the Sessions Judge to support the charge under section 326 read with section 149 though the further ingredients of an unlawful object common to the assembly as a whole was wanting. In our opinion the decision in *Panchu Das* v. *Emperor* (1) which was a decision earlier than the decision of the Privy Council in the case of *Barendra Kumar Ghosh* v. *Emperor* (2) was a decision upon the facts and at most could only be held to apply to circumstances where the substantive charge could only be supported upon evidence not adduced at the trial on a charge based on a combination of the substantive section with section 149 and the accused were consequently prejudiced. If it went further the decision was plainly obiter and we decline to follow it.

In the case of *Reazuddi* v. *The King-Emperor* (3) which was decided in 1911 (also before the decision of the Privy Council) it was held that a charge under

(1) (1907) I. L. R. 34 Cal. 698. (2) (1925) I. L. R. 52 Cal. 197, P. C.
(3) (1911-12) 16 Cal. W. N. 1077.

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section 325 read with section 149 would not support a conviction under section 325 read with section 34. In that case the appellants were convicted under section 147 and under section 325 read with section 149. The Sessions Judge on appeal set aside the conviction under section 147 and altered the conviction under section 325 read with section 149 to one under section 325 read with section 34. The High Court sent the case back for re-trial and said, "We are clearly of opinion that this rule must be made absolute and a re-trial ordered upon the ground on which it was issued. When a Court draws up a charge under section 325 read with section 149 it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves but that they are guilty by implication of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt. Now when these persons are acquitted of rioting obviously all the offences which they are said to have committed by implication disappear, and the defence cannot be called upon to answer to the specific act of causing grievous hurt merely because it may have appeared in the evidence; for the Court having already declared by its charge that they did not commit a specific act and not having given effect to the evidence for the prosecution by framing a fresh charge the defence would not be justified in wasting the time of the Court in defending themselves on a charge which had never been brought against them. This will be perfectly clear if the offence disclosed by the evidence was the heinous one of murder and the Court framed no charge of murder, but went on with the charge of rioting; obviously in that case the accused could not be called upon to defend themselves on the charge of murder; for it is only in the Sessions Court that the said charge can be tried. The Magistrate appeals to the provisions of section 34; but section 34 can only come into operation when there is a substantive charge

of causing grievous hurt." Now follows an important passage in the judgment which shews why in my view the judgment must be considered to be overruled by the decision of the Privy Council:—"The considerations which govern section 34 are entirely different and in many respects the opposite of those which govern section 149, and it is now settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence."

The reasoning of the decision (entirely dispelled by Lord Sumner) was based on the view that section 34 necessarily involved specific acts or a group of specific acts of a similar character which brought about the wounding or killing of the persons injured. At that time the Court did not understand the real meaning of section 34 and the whole basis of the decision has been destroyed by the judgment of Lord Sumner. Before that judgment it was believed that section 34 only covered a group of acts of a similar character which contributed to a common result but this view has now been dispelled and it follows that the same act on the part of Bhondu Das alleged in the charge and the evidence in this case in support of sections 326 read with 149 would also support a charge under section 326 read with section 34. By way of illustration we may ask whether in the case decided in the Privy Council the accused would have been better off if in addition to having been present and armed with a pistol he had shouted to the man who actually fired the fatal shot "kill him" or "shoot him." It is obvious that in such circumstances the accused would have been no better off and that section 34 would still have been rightly applied by the Privy Council. Finally we are supported in this view by the reasoning in the case of *Government of Bengal* v. *Mahaddi* (1) which was decided on the combined sections 325 and 149. The learned Judges there said:—"In our opinion, under the terms of section 457 of the Code of Criminal

(1) (1880) I. L. R. 5 Cal. 871, 873.

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Procedure, it was competent to the jury to return a verdict of guilty only under section 325, Penal Code, although that offence did not form the subject of a separate charge, but was entered in a charge coupled with section 149, Penal Code. Section 457 of the Code of Criminal Procedure enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence." This dealing with the question of a minor offence is not really relevant to this case. They then go on, " Thus in the present case the prisoners were not charged themselves with having caused the grievous hurt, but were charged with being members of an unlawful assembly, some of the members of which, in prosecution of its common object, caused that grievous hurt. The verdict of the jury was, as we understand it, that there was no assembly, but that the grievous hurt was nevertheless caused by these two prisoners. Section 263 requires that

' The jury shall return a verdict on all the charges on which the accused is tried.'

" The requirements of the law are satisfied if, in returning their verdict, a jury acting under section 457, returns a verdict of conviction of a minor offence forming part of one of the charges." The point, however, about the minor offence is not that for which I was citing the case. Further in the case of *Abhiram Jha* v. *King-Emperor* (1) the report of which is very short dealt specifically with the case of *Panchu Das* v. *Emperor* (2). The headnote is " charge of offence under section 326 read with section 149 of the Indian Penal Code " which are the very sections with which we are here dealing. Their Lordships observed :— " It is argued on the authority of *Panchu Das* v. *Emperor* (2) that the petitioner, Babu Misra, should not have been convicted under section 326 when that charge had reference to section 149 of the Indian Penal

(1) (1910-11) 15 Cal. W. N. cxliv (N.).
(2) (1907) I. L. R. 34 Cal. 898.

Code. We have examined the case cited as also the case of *Ram Sarup Rai* v. *The Emperor* (1) on which it is founded. Each case must be decided on its own facts, and we are not here restricted by considerations which might apply if the petitioners had been tried by jury. The petitioner Babu Misra committed an offence independently. He wounded Kapleswar Jha and though it was sought to implicate him in reliance on section 149, the finding is that he was the actual assailant of Kapleswar Jha. In this sense the offence under section 326 was included in the constructive offence under section 326 read with section 149 of the Code." That is the extent of the report and in our opinion the facts having regard to the new interpretation placed upon section 34 by the Privy Council bring this case within that authority. There is also the case of *Queen* v. *Ramjirav Sivbajirav* (2) which is of some help to us because it is based upon parity of reasoning. That part of the headnote which is material is as follows:—"Where a person was charged by an Assistant Sessions Judge with (*1*) attempting to commit criminal breach of trust as a public servant; (*2*) framing as a public servant an incorrect document to cause an injury; (*3*) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent, the High Court held that the Judge ought to have convicted him of attempting to cheat under sections 455, 456 of the Code of Criminal Procedure; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing though not distinctly taken in their appeal by the Government, and ordered a re-trial of the accused." These cases illustrate the real test of

(1) (1901-02) 6 Cal. W. N. 98. (2) (1875) 12 Bom. H. C. R. 1.

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whether a conviction can be upheld upon a charge which was not expressly formulated, i.e., whether the facts which it was necessary to prove and on which evidence was given on the charge upon which the accused is actually tried are the same as the facts upon which he is to be convicted of the substantive offence. If they are and if the accused is put to no disadvantage and would have had to adduce no further evidence then he may be rightly convicted of the substantive offence notwithstanding that the charge was originally framed under section 147, 148 or 149. In our opinion therefore the view of the Sessions Judge was right.

It was contended, though hardly seriously, that the petitioner and his party were doing no more than making use of their right of private defence against would-be dispossessors. This contention we reject. Deadly weapons such as garasas are in no circumstances necessary for the eviction of unarmed trespassers. When a man himself armed with a deadly weapon addresses others similarly armed and calls upon them to assault a third party the irresistible implication of his incitement is that they are to make use of their weapons. It was therefore clear, and the evidence fully supports the conclusion, that the petitioner was inciting his co-accused not merely to perform the usual operations of self-defence but to inflict grievous injury upon the complainant's party. The petitioner was present when the offence abetted by him was committed and is punishable as though he had himself committed the offence, and this brings the case clearly within section 34.

The sentences imposed are not in our opinion too severe. The offence was committed not in defending the petitioners from attack but in asserting their rights against others who, however wrongly and unlawfully, were in physical and peaceful possession of the land whose lawful possession appears to be vested in the petitioners. In other words the

petitioners were the aggressors and it must be known that the use of deadly weapons by aggressors cannot be justified on any ground of legal right. The convictions will be upheld and the sentences will stand.

ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

NARAYAN MISTRI

v.

RAM DAS.*

1928.

April, 26.

Provincial Insolvency Act, 1920 (*Act V of* 1920), *sections* 10, 24 *and* 25—*debtor's inability to pay, enquiry into—court to be satisfied on the evidence adduced by applicant—creditor whether entitled to adduce substantive evidence—concealment of property, enquiry as to, when should be made—section* 20 (*1*) *proviso, scope of.*

Section 24, Provincial Insolvency Act, 1920, provides:

"(1) On the day fixed for the hearing of the petition..... the court shall require proof of the following matters, namely, (*a*) that the creditor or the debtor as the case may be, is entitled to present the petition:

Provided that where the debtor is the petitioner, he shall for the purpose of proving his inability to pay his debts be required to furnish only such proof as to satisfy the court that there are prima facie grounds for believing the same and the court if and when so satisfied, shall not be bound to hear further evidence thereon; .....

(2) The court shall also examine the debtor if he is present, as to his conduct, dealings and property in the presence of such creditors as appear at the hearing, and the creditors shall have the right to question the debtor thereon."

Held, (per *Kulwant Sahay, J.*) that the court, before making an order of adjudication, has to be satisfied only upon the evidence adduced by the debtor that the debtor who applies

*Appeal from Original Order no. 117 of 1927, from an order of W. H. Boyce, Esq., I.C.S., District Judge of Patna, dated the 16th May, 1927.