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implied." When a tree which ex hypothesi it was intended that the reclaimer should cut down, the landlord getting rent for the cultivated area, is conserved by the reclaimer, he is not liable by custom or otherwise in the Ranchi district to pay rent or a tax in respect of the tree if he cultivates lac on it, unless on a stipulation in the original settlement to that effect.

No other point arises. The appeal is entirely without merits and I would dismiss it with costs.

ADAMI, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Terrell, C.J. and Allanson, J.

1928.

August, 3.

BAJO SINGH
v.
KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 72—*separate sentences under sections* 147 *and* 326/149 *whether legal—Code of Criminal Procedure*, 1898 (*Act V of* 1898), *section* 35, *amendment of.*

Separate sentences under sections 147 and 326 read with 149, Penal Code, are illegal.

Nilmony Podar v. *Queen-Empress*(1), *Paltu Singh* v. *King-Emperor*(2), followed.

Queen-Empress v. *Bana Punja* (3) and *Emperor* v. *Piru Rama Havaldar* (4), not followed.

*Criminal Revision no. 280 of 1928, from an order of J. A. Sweeney, Esq., I.C.S., Sessions Judge of Monghyr, dated the 10th April, 1928, upholding an order of Babu Harihar Charan, Assistant Sessions Judge of Monghyr, dated the 19th November, 1927.

(1) (1889) I. L. R. 16 Cal. 442, F.B.
(2) (1918) 3 Pat. L. J. 641.
(3) (1893) I. L. R. 17 Bom. 260, F. B.
(4) (1925) I. L. R. 49 Bom. 916.

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

Manohar Lal (with him *B. P. Varma*), for the applicant.

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

ALLANSON, J.—The eight petitioners were convicted by the Assistant Sessions Judge of Monghyr under sections 147 and 326/149 of the Penal Code and sentenced to one year and three years rigorous imprisonment, the sentences to run consecutively. Their appeal to the Sessions Judge has been dismissed.

One Musammat Permeswari, a relative of petitioner Bhagwat, had for some years leased out plot no. 1173 to him on batai. In Jeth last year she settled it with another relation Nemdhari Singh on batai. When the ploughing season began on the 16th June, 1927, Nemdhari Singh went to the field with a ploughman and his two sons, Dwarka and Ramphal. The petitioners and others turned up armed with cutting weapons and lathis, stopped the ploughing and took away the ploughman. Dwarka and Ramphal had previously returned to the village to inform the chaukidar that there was likely to be a disturbance, and the chaukidar went to the thana and lodged a saneha. Meanwhile, the two sons returned from the village with lathis. Nemdhari had followed the mob and on a dagar at some distance from the field the petitioners attacked Nemdhari and his two sons. Ramphal received four incised wounds, two of them on the left leg, and haemorrhage from these two wounds caused his death shortly afterwards. Nemdhari had his left ulnar bone fractured and several lacerated wounds. Dwarka had a lacerated wound and bruises.

The defence in the trial Court alleged that the occurrence took place in the field, but this point has not been argued before us and it is a question of fact.

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It is argued on behalf of the accused that they were maintaining a right to the field. This argument is based on the fact that Nemdhari admits that he did not give any notice of the change of lease to Bhagwat. A batai lease is a lease from year to year, which terminates when the crop is cut. It is admitted by Nemdhari that the first time he went to the field was on that day. Between the previous harvest when admittedly the land was in possession of Bhagwat and the ploughing on this date, no party would have any reason to exercise any act of possession. The learned Sessions Judge has found that, even if Bhagwat did dishonestly retain possession of the land and prevent Nemdhari from ploughing, that did not justify the subsequent attack on these three persons. He has found that it is clear that these three men of whom, at any rate, only two had lathis, were attacked by a mob armed with cutting weapons. The fact that the petitioners and others went to the field of which they say they were in possession with cutting weapons and lathis, when it was being ploughed by three unarmed men shows the intention with which they came, namely, to use violence. The learned Sessions Judge has found it proved that all the petitioners were members of an unlawful assembly with the common object of beating Nemdhari and his sons. The accused called no witnesses, and there is no evidence that any injuries were inflicted on any one on their side. The fact that the attack on Nemdhari and his two sons took place after the ploughing had been stopped and on a dagar at some distance from the field shows that the petitioners were not exercising the right of private defence of property even if they were in possession.

It has been argued that separate sentences under sections 148 and 326 read with 149 are illegal. The question would only have been of academic importance had the learned Assistant Sessions Judge passed concurrent instead of consecutive sentences. Reliance

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was placed on *Nilmony Podar* vs. *Queen-Empress*(1) which was followed by a Division Bench of this Court in *Paltu Singh* v. *King-Emperor*(2). It was contended by the learned Assistant Government Advocate, relying on *Emperor* v. *Piru Rama Havaldar*(3), that the amendment of section 35 of the Code of Criminal Procedure by Act XVIII of 1923 has restored the previous view of the law as indicated in *Queen Empress* v. *Bana Punja*(4). But the question before the Court in *Empress* v. *Piru Rama Havaldar*(3) was whether separate sentences are permissible for offences under sections 148 and 326. The amendment of section 35 has made it clear that separate sentences under sections 148 and 326 are legal. But it is contended on behalf of the petitioners that the amendment of that section, in which the words

"subject to the provisions of section 71 of the Indian Penal Code"

have been inserted, has not invalidated the reasoning of the learned Judges in the above Full Bench case of the Calcutta High Court [*Nilmony Podar* v. *Queen-Empress*(1)]. The following passage from the above authority may be cited:—

"Paragraph 1 of section 71 of the Indian Penal Code is to the following effect:—'Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences unless it be so expressly provided.' In this case the offence of voluntarily causing hurt under section 324, coupled with section 149 of the Indian Penal Code, of which these appellants have been found guilty, is primarily made up of two parts, viz.: (*1*) of their being members of an unlawful assembly, by which force and violence was used in prosecution of its common object, and the members of which were armed with deadly weapons; and (*2*) of the offence of

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voluntarily causing hurt being committed by two other members of the unlawful assembly in prosecution of its common object. The first of these two parts is itself an offence, viz., rioting, armed with deadly weapons, under section 148 of the Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of section 71 of the Indian Penal Code are present here. Consequently the infliction of separate punishments for the two offences is illegal under it."

I am in agreement with Mr. Manohar Lal that the amendment of the section does not invalidate the above reasoning. That case has been followed by this Court in the above case of *Paltu Singh* v. *King-Emperor*(1), and we are bound to follow that decision. Separate sentences, therefore, were illegal.

There remains the question as to what sentences ought to be passed. If we consider that a total sentence of four years is not excessive, we are at liberty to follow the course adopted in the above case and treat the sentence in regard to each prisoner as a consolidated sentence of four years passed under section 326 read with 149. The occurrence was a serious one. It led to one death, and the man who died as the result of his injuries received as many as four incised wounds. A pharsa was also used on Dwarka. The frequency of riots by persons armed with cutting weapons does not encourage the Court to pass light sentences on persons who form part of a mob some of the members of which were armed with cutting weapons, which were used with fatal result. On the other hand 8 relations of three generations have been given the same sentence irrespective of age. One is an old man of 78, another is a boy of 18. Against these two and Paryag there was no allegation that they used cutting weapons. The

(1) (1918) 3 Pat. L. J. 641.

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attention of the committing Magistrate should be called to the fact that he recorded the age of Palku as 40 and of his son paryag as 35.

The separate sentences passed on the petitioners under section 147 are set aside. The sentences on Ajodheya and Nokha under section 326/149 are reduced to the period already served. The sentences on Paryag and Palku are reduced to one year's rigorous imprisonment. The separate sentence on the remainder will be treated as a consolidated sentence of 4 years under section 326/149.

TERRELL, C.J.—I agree.

Sentences modified.

APPELLATE CRIMINAL.

Before Terrell, C.J. and Fazl Ali, J.

1928.

August, 10.

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Code of Criminal Procedure, 1898 (Act V of 1898), section 162—provision mandatory—Court, jurisdiction of, to refuse to grant copies—court, power of, to look into police diaries for the purpose of finding out contradiction—statement before police, whether can be used by prosecution for corroborating statement made in court.

The language of section 162, Code of Criminal Procedure, 1898, is mandatory and, therefore, once an application has been made by the accused for copies of statements recorded under section 161, the court has no jurisdiction to refuse unless the case comes under the second proviso to section 162.

Ram Gulam Teli v. *King-Emperor*(1), followed.

Maduri Sardar v. *King-Emperor*(2), dissented from.

A statement recorded under section 161 cannot be used by the prosecution for its own purposes and specially for the purpose of corroborating the statements made by prosecution witnesses in court.

*Criminal Appeal no. 102 of 1928, from a decision of Babu Kamala Prasad, Assistant Sessions Judge, Patna, dated the 21st April, 1928.

(1) (1928) I. L. R. 7 Pat. 205. (2) (1927) I. L. R. 54 Cal. 307.