1936.

SOMESHWARI PRASAD v. MAHESHWARI PRASAD.

SIR SHADI LAL.

and hold that both these villages shall be added to the list of the properties to be partitioned among the persons who are Ran Bahadur's heirs under the Hindu law.

The result is that the appeal is allowed to the extent indicated above, and the decree made by the High Court modified by including the villages Telonari and Palangi among the properties to be partitioned and by referring to the trial Court under Order XLI, r. 25, of the Code of Civil Procedure the questions whether any villages to be specified by the plaintiffs from lists *A* or *B* were the self-acquired properties of Ran Bahadur and if so, whether any such self-acquired villages were incorporated by him with the estate. The appellants having failed on the main issue must pay the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Barrow, Rogers and Nevill.*

Solicitors for respondents: *Watkins and Hunter.*

1936.

Sept., 8, 9, 10, 11, 14, 18.

APPELLATE CRIMINAL.

Before Fazl Ali and Dhavle, JJ.

BIPAT GOPE

v.

THE KING EMPEROR.*

Trial by jury—Code of Criminal Procedure, 1898 (*Act V of 1898*), *sections* 282, 283—*Sessions Judge, inherent power of, to discharge a jury—*

The Sessions Judge discharged the jury, after the trial had proceeded for five days as he considered that absolute impartiality might not be evinced by them, and empannelled a fresh jury.

*Death Reference no. 29 of 1936 with Criminal Appeal no. 198 of 1936, directed against the order of P. Chaudhury, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 11th August, 1936.

Held that the power of the Sessions Judge to discharge a jury was not confined to cases of misconduct or to provisions of sections 282 and 283 but he had inherent power to discharge a jury and empannel another.

Rahim Sheikh v. *Emperor*(1), *followed.*

Even if the High Court considered the order unjustified, the only relief the High Court could give was to order a fresh trial, which had already been done in the case.

Abdur Rashid v. *Emperor*(2), followed.

Reference under section 374 of the Code of Criminal Procedure.

The facts of the case material to this report are set out in the judgment of the Court.

Yunus (with him *K. Sahai* and *R. J. Bahadur*), for the appellants.

Assistant Government Advocate, for the Crown.

FAZL ALI AND DHAVLE, JJ.—The twelve appellants were tried by jury before the Additional Sessions Judge of Patna on charges of rioting with murder and causing hurt individually with bhalas. The jury returned a unanimous verdict of guilty on all the charges except the direct charge of murder under section 302, I. P. C. The Additional Sessions Judge accepted this verdict, and under section 302, I. P. C. read with section 149, I. P. C. sentenced eight of the appellants to death and the other four appellants—Karamchand, Ramu, Chintaman and Sheolochan—to transportation for life, and considered it unnecessary to pass any separate sentences under sections 147, 148 or 324, I. P. C. The matter is now before us under section 374 of the Code of Criminal Procedure for confirmation of the death sentences and also on appeal by the twelve convicted persons.

(1) (1923) I. L. R. 50 Cal. 872.

(2) (1929) I. L. R. 56 Cal. 1032.

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

Bikku Kahar, the son of a Kurmi father and a Kaharin mother, according to the case of the prosecution, used to side with the Kurmis of his village Jamuara in the disputes that had been going on between them and the Goalas of the village. The appellants are all Goalas, appellant Bipat being the *barahil* of the entire body of landlords of the village. Nakat Mahto, nephew of Bikku's father, was jethraiyat under M. Shamsuddin, one of the landlords of the village, and had been repeatedly complaining (along with other Kurmi raiyats) to him of the Goalas uprooting and destroying their crops. On the morning of the 29th of February last, Bikku was going past the house of Bipat when appellant Karamchand, son of a cousin of Bipat's, began to cough loudly, Bikku responding to the gesture by twisting his moustaches. An actual assault was, however, prevented by the intervention of two villagers.

In the afternoon, at about 2 o'clock, Bikku happened to be going towards his "bút" field, plot no. 1651, in the block called Punai Khandha. Immediately to the east of this field was a plot of one Karmu Mahto, plot no. 1650, which was lying fallow at the time. Four of the appellants—Sundar, Karamchand, Chintaman and Ramu—were grazing their buffaloes in this parti field and feeding them with gram plants uprooted from Bikku's plot. Bikku protested against this and was assaulted by Sundar and Karamchand with lathis. He fled north-east towards his khesari field, plot no. 1750, in Behera Khandha, about 110 *bans* (say 300 yards) away, chased by the four appellants who had been grazing the buffaloes. The other eight appellants then came up—Bipat from Bighapar on the north-east and the remaining seven from beyond a stream called the Lokain river which lay to the south. Four of these eight men—Ghuran, Raghu, Bimal and Sheolochan—had bhalas, and the rest lathis. The appellant Sundar caught Bikku in the khesari field, Bipat ordered an assault, Raghu and Ghuran felled Bikku with their bhalas, and then all

the appellants surrounded him and assaulted him with bhalas and lathis. They next carried him from the khesari field past the stream to the sandy portion on the south, and then dragged the body to a *mirchai* field, plot no. 1808, about 50 paces farther off. The commotion brought several Kurmis of the village to the northern side of the stream, and when Khublal Mahto, who after working as dafadar of the circle for 26 years had on account of old age been replaced by his son, began to cross the stream, the appellants ran away, leaving the body of Bikku in the *mirchai* field. Bikku expired as the ex-dafadar fetched some water in his gamcha from the Lokain and put it into Bikku's mouth. Information of the occurrence was given at the thana of Hilsa, five miles away, at 5-30 that afternoon by Firangi Kahar, son of Bikku, who happened to have heard of it from Firangi Mahto, a man who had protested against the appellants' assault on Bikku and had thereupon been struck by the appellant Sheolochan on the right leg with a bhala. The Sub-Inspector arrived on the scene in due course and had the dead body of Bikku sent for the post mortem examination. The Assistant Surgeon of Bihar who made the post mortem examination found a very large number of injuries " probably caused by a hard and rough blunt substance and a pointed sharp-edged weapon ", and pronounced the death to be due to the consequent shock and haemorrhage.

The defence was that the appellants had been falsely implicated on account of the enmity with the Kurmis, and that they were none of them except Ghuran in the village at the time of the murder but were working in *khandhas* at a distance from the village. As to appellant Ghuran, the story given by him in his examination before the Sessions Judge, was that he and one Bakhori had found the buffaloes of Bikku and Motar Mahto grazing, unattended by any cow-herd, in Ghuran's " bút " field in Punai Khandha and an adjoining field of Bakhori in Behera Khandha, that they were taking the trespassing

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

cattle to the pound, when Bikku came and raised a hullah which brought eight or nine other men, presumably Kurmis, on the scene, that Firangi Mahto aimed a blow at Ghuran with a *khanti*, which, however, was snatched away by Bakhori and used upon Firangi, that on the cries of Ghuran eight or nine men came up from the neighbouring tolas of Gosainpur, Maheshpur, etc., and that there was an exchange of lathi-blows between them and Bikku in the *mirchai* field, while Ghuran went away and impounded the cattle in the Hilsa pound.

We have already referred to the verdict of the jury. As death sentences have been passed, the appeal is not, as in ordinary cases tried by jury, confined to matters of law but extends to matters of fact as well, even in respect of persons not sentenced to the extreme penalty of the law. This does not, however, mean that the verdict of the jury is to be lightly ignored.

Generally speaking, no exception has been taken to the charge of the learned Judge to the jury, nor have we been able to find any misdirection in it or any misunderstanding of the law as laid down by the Judge in the verdict of the jury.

The only point of law raised on behalf of the appellants is that the Judge, so it is contended, erred in the exercise of his discretion in discharging the jury before which the trial had begun and proceeded for five days and trying the case with a fresh jury. It is further contended that this error on the part of the learned Judge entitles the appellants to another trial by jury. What appears to have happened is that after the cross-examination of M. Shamsuddin, one of the landlords of the village, the foreman of the jury then trying the case sought to put to the witness the question

"Do you belong to Nataul where the Muhammadan landlords have been fighting with the Goalas of the village ?"?

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

Asked why he wanted to put this question, the foreman said that he desired to find if the witness was to be believed or not, and further, that if the witness was from the village of Nataul, he would be disbelieved because he was giving evidence against the Goala accused in the case out of previous enmity. The learned Judge then stopped the trial and took time to consider the position. On the following day the foreman was further questioned; and as a result, the learned Judge came to the conclusion that while there was no ground for holding that the foreman had been guilty of any misconduct, "his position in the jury box must be viewed with concern", and that the circumstances gave "cause for apprehension that absolute impartiality which is expected of the jury may not be evinced while giving the verdict at the end of the trial". He accordingly discharged the jury and summoned a fresh jury for the trial to begin a week afterwards. A petition was at once filed on behalf of the accused persons, praying for legal assistance at the cost of the Crown, and further praying that the advocates who had already worked on their behalf be appointed for the defence at the re-trial; and the Judge ordered that a copy of the petition be forwarded to the District Magistrate for necessary action. On the day fixed for the new trial none of the defence lawyers was present, nor had the District Magistrate appointed any lawyer to defend the accused—on the ground, as appeared from the reply subsequently received from him, that the accused did not appear to be entitled to the concession prayed for as they had so far been defending themselves at their own cost. The Public Prosecutor drew the attention of the learned Judge to a rule in the Treasury Manual under which the Sessions Judge was empowered to engage a pleader for the defence at the cost of the Crown, and the learned Judge exercised this power and appointed the seniormost lawyer from the Crown list found willing to defend the accused, who was also agreed to by the accused. So far, therefore, as

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

it has been contended on behalf of the appellants that they were prejudiced by the second trial because they could not be properly defended, it is clear that the appellants have no reasonable grievance, and indeed it was conceded that the learned Judge had done the best he could for the accused in the circumstances. It is beyond question that while the Code of Criminal Procedure does not provide for discharging a jury during the continuance of a trial except in the circumstances mentioned in sections 282 and 283, " where the question of misconduct on the part of the jury or other similar cause arises ", as Buckland J. put it in *Rahim Sheikh* v. *Emperor*(1), " the Sessions Judge has inherent power to discharge a jury and empannel another ". It has, however, been argued for the appellants that the case referred to is no authority for discharging the jury except for misconduct, that in the present case the Judge had expressly found that there was no misconduct on the part of the foreman but had merely acted on the apprehension of the Public Prosecutor that " the foreman may be prejudiced against the prosecution case on account of his personal knowledge of facts outside the scope of the trial ", and that this was no valid ground for discharging the jury. It was further urged that it was open to this Court to consider the sufficiency of the reasons which led the Judge to discharge the jury, and if the reasons be found insufficient, to order a fresh trial. In support of these contentions, reliance was placed on the observations of Graham J. in *Abdur Rashid* vs. *Emperor*(2) that " Suspicion in the mind of a Public Prosecutor can never be recognised as a good and valid ground for discharging a jury. Something much more tangible and definite than that is necessary ", and of Suhrawardy J. in the same case that " In view of the wide provisions of section 439

(1) (1923) I. L. R. 50 Cal. 872.

(2) (1929) I. L. R. 56 Cal. 1032.

of the Code of Criminal Procedure, it is difficult to say that this Court is debarred from enquiring into the validity of the reasons for discharging a jury ". But Graham J. himself went on to observe " But though, I think, the order (discharging a jury) cannot be supported, it seems to me to be quite out of the question to set it aside ", and later on " There may be some doubt as to whether we can set aside such an order when once it has been made. But we can, and I think, ought to direct a de novo trial before a fresh jury, and if possible before another Judge "—this was in a case where a rule had been obtained against the order discharging the first jury and before the accused had been tried by a fresh jury. Suhrawardy's view that the order discharging a jury during the continuance of a trial can be questioned in the High Court does not seem to have been shared by any other Judge of the High Court, though the matter has been considered in Calcutta on various occasions. And in any case it is obvious that even if an order discharging a jury in the exercise of the inherent power of a Sessions Judge were to be found unjustified, the only relief that the High Court could give would be to order a fresh trial before another jury. The appellants have had such a trial already, so that there can be no further grievance in the matter of the discharge of the first jury. Nor is the contention that the learned Judge acted merely on the apprehension of the Public Prosecutor that the foreman may be prejudiced supported by the facts on record, as was the case in the decision of *Abdur Rashid* v. *Emperor*(1). The learned Judge only referred to this contention of the Public Prosecutor and said that there was some force in it, but it is quite clear that he came to his own conclusion that there was in the circumstances " cause for apprehension " that the jury may not evince absolute impartiality. The inherent power of a Sessions Judge to discharge a jury is not confined to cases of misconduct, as is clearly

(1) (1929) I. L. R. 56 Cal. 1032.

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

shown by the dictum of Buckland, J. already quoted, and plainly extends to cases where the Judge finds reason for doubting the impartiality of the jury. It is also clear that the learned Judge below did not lightly arrive at such a finding. Both the sides were agreed in the lower court that " if the impartiality of the foreman of the jury is doubted, all the jurors should be discharged ", and it cannot be, and has not been, suggested that the Judge should have discharged the foreman only. The only point of law raised on behalf of the appellants thus fails altogether.

* * * * *

[Their Lordships then discussed the evidence in the case.]

* * * *

Thus in our opinion the case for the prosecution as to the origin of the occurrence is substantially true and the jurors were quite justified in accepting it. Assuming, however, for the sake of argument, that Bikku was assaulted as is suggested on behalf of the defence in trying to rescue his buffaloes which had been seized by Ghuran and Bakhauri, it is clear that the persons who are proved to have taken part in assaulting Bikku cannot even on this supposition escape conviction, because there is no evidence on the record to show that the field of Ghuran or Bakhauri had been grazed or that there was any other justification for their seizing Bikku's buffaloes. The charge which has been drawn up in this case states that the object of the unlawful assembly of which the accused are said to be members was to assault Bikku and this charge can be sustained even on the supposition that the occurrence originated in the manner suggested by Ghuran.

We will now turn to the most important question, namely, whether any of the appellants and if so which of them had taken part in the assault on Bikku. In this connection we shall deal first with the cases

of the three appellants, namely, Bipat, Sheolochan and Chintaman whose names were not mentioned in the first information report. As we have already stated, the information was lodged by Firangi Kahar, a son of the deceased, and one Deolal Mahto (P. W. 3) was also with Firangi Kahar when he lodged the information. It is true that Firangi Kahar was not an eye-witness of the occurrence but at the same time it cannot be overlooked that Firangi Kahar had derived his information from Firangi Mahto who not only claims to have seen the occurrence but had himself been assaulted. Firangi Mahto himself has stated that he named all the assailants of Bikku to Firangi Kahar and that he had done so in the presence of Deolal. He further states that he had named all the 12 appellants to him. From the evidence of the Sub-Inspector, however, it appears that Deolal Mahto also had named those persons only who had been mentioned by Firangi Kahar in his first information report. If Firangi Kahar alone had gone to the thana it was possible to hold that he might not have remembered the names of some of the accused persons who had been named to him by Firangi Mahto. In the present case, however, Firangi Kahar and Deolal went together to the thana and it seems very unlikely that they would have made the same mistake and that both of them would have mentioned only 9 persons although they had been furnished with the names of 12 assailants. As we have already stated, the appellant Bipat Gope is a barahil of the maliks and to him the prosecution witnesses have also assigned the important part of ordering the assault on Bikku. It seems to us very unlikely that the name of this important accused person would have been omitted by both Deolal and Firangi Kahar, if his name had been mentioned in the first instance to them by Firangi Mahto. Curiously enough Pragash Mahto, who was also one of the eye-witnesses and who has stated before the Sessions Judge that Bipat had come from Bighapur and ordered the assault, did not implicate him before the investigating officer. Besides

1936.

BIPAT GOPE v. THE KING-EMPEROR.

FAZL ALI AND DHAVLE, JJ.

Deocharan Mahto (P. W. 8) and Gobind Mahto (P. W. 12) two of the witnesses who were on the scene of the occurrence soon after the assault on Bikku have also not named Bipat although they say that they saw a number of accused persons with bhalas and lathis on the south of the river. In this state of the evidence it appears to us that the conviction of Bipat cannot be sustained.

The case against Sheolochan also appears to us to be not free from doubt. As we have already stated, the prosecution case is that Firangi Mahto was assaulted by Sheolochan with a bhala soon after the occurrence. Both Firangi Kahar and Deolal have stated that when they met Firangi Mahto they noticed a bleeding injury on his leg and it is not likely that if he had named Sheolochan specifically to them as having inflicted the injury they would not have mentioned his name at all to the police. It is true that Firangi Kahar has stated in the first information report that he did not remember the name of the person who had assaulted Firangi Mahto, but on a careful reading of the document it would appear to be implied that his assailant was one of the nine persons who had been named by him. Another remarkable fact which may be mentioned in this connection is that the injury which was found on Firangi Mahto was an incised injury and according to the medical report it was caused by a sharp cutting weapon. The case, however, which is put forward in court is that it was caused by a bhala. It is true that the doctor has stated that the injury might be caused by a bhala if the blade of the bhala was sharp, but it appears to us that in this respect the statement made by Ghuran that the injury on Firangi Mahto had been caused by means of a *khanti* is more probable than the statement of Firangi Mahto that it was caused by a bhala. We think that both Bipat Gope and Sheolochan are entitled to the benefit of the reasonable doubt which has arisen in their case and should be acquitted. We cannot also reasonably

differentiate their case from the case of Chintaman, a young man of 22, whose name also does not appear in the first information and we think that in the circumstances of the case it would be unsafe to uphold the conviction of this appellant also.

We shall now deal with the case of two other appellants, namely, Ramu and Bimal, who belong to the same family as Aklu, Bipat and Raghu, the other appellants before us. The fact that these five appellants exhaust the entire stock of the direct descendants of Mangal Bhagat must put us on our guard in scrutinising the evidence against these two men. We cannot, therefore, lightly pass over any palpable discrepancy relating to their participation in the occurrence. The only discrepancy which need be mentioned here with regard to these accused persons is a two-fold one. In the first place we find that according to one version Ramu was armed with a lathi and Bimal with a bhala and according to another version Ramu was armed with a bhala and Bimal with a lathi. This by itself is a small point and would not have weighed with us; but we further find that while on the one hand Pargash and Rambaran, two of the eye-witnesses, have definitely stated that Ramu was one of the four persons who were grazing the buffaloes in the field of Karmu Mahto and that he was also one of the four persons who had chased Bikku in the first instance, Firangi Mahto, who is the most important eye-witness in the sense that his presence at the time of the occurrence has been admitted even by Ghuran Gope, has stated in his evidence that this accused person had come from the side of the Lokain river along with Ghuran, Raghu and several other appellants and there is a similar discrepancy in the case of Bimal also. In the case of Ramu there is the further fact that he does not appear to have been named by Pragash one of the eye-witnesses, before the police, or by prosecution witnesses nos. 8, 12 and 15 in Court. In our opinion the cases of Ramu and Bimal are so inter-connected

1936.

BIPAT GOPE v. THE KING-EMPEROR.

with each other that it is not possible to reject the evidence as against one and accept the evidence as against the other. In these circumstances we think that both these accused persons should be given the benefit of doubt and acquitted.

FAZL ALI AND DHAVLE, JJ.

As regards the remaining seven appellants the evidence against them appears to be fairly strong and we think that they have been rightly convicted. On a reference to the post-mortem report it would appear that although none of the injuries on Bikku taken by itself was fatal, yet he had numerous injuries on his body and had been assaulted in a most merciless manner. Among the more serious injuries on him may be mentioned punctured wounds on the top of his head and on the right side of his face, compound fractures of the left ulna and the left tibia and a fracture of the left fibula. Having regard to the number of injuries on Bikku and the manner in which he was assaulted we have no doubt in our mind that his assailants must have either intended to cause his death or were at least aware of the fact that the injuries inflicted upon him were likely to cause his death and were also sufficient in the ordinary course of events to cause death and the jurors were, therefore, justified in holding that an offence under section 302 read with section 149 of the Indian Penal Code was committed by such of the persons as were members of the unlawful assembly in prosecution of the common object of which Bikku has been so brutally assaulted.

Now turning to the question of sentence we have no hestitation in confirming the sentence of death on Raghu Gope and Ghuran Gope who are both proved to have been armed with bhalas and to have taken a prominent part in the assault. With regard to the remaining appellants the evidence is of a somewhat general character and it is possible that some of them may not have actually assaulted the deceased. In any case as these persons were

1936.

BIPAT GOPE v. THE KING-EMPEROR.

armed with lathis only and as none of the blows said to have been caused by lathis was either fatal by itself or was delivered on a vital part of the body, we think that the ends of justice will be served by sentencing them to transportation for life.

FAZL ALI AND DHAVLE, JJ.

The result is that the appeals of Bipat Gope, Sheolochan Gope, Chintaman Gope, Ramu Gope and Bimal Gope are allowed, their convictions and sentences are set aside and they are acquitted. As to the remaining seven appellants while the sentences of death on Raghu Gope and Ghuran Gope are confirmed, the remaining five persons are sentenced to transportation for life.

J. K.

REVISIONAL CRIMINAL.

Before Fazl Ali and Dhavle, JJ.

1936.

Sept., 22.

KUMAR CHOUDHURI

v.

THE KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 196, 197 *and* 198—*knowingly using false certificate as true—certificate granted by Chairman of Municipality based on Death Register, if a certificate contemplated by sections* 197 *and* 198—*prosecution, if can be based on evidence not shown to be in existence under section* 196.

The petitioner in support of his defence produced a certificate granted by the Chairman of the Cuttack Municipality which was based on an entry in the Death Register and also summoned the family astrologer to produce an almanac, to prove the date of his father's death. The Small Cause Court Judge found the date of death in the certificate to be incorrect and the petitioner was tried and convicted.

*Criminal Revision no. 3 of 1936 (Cuttack), against an order of A. N. Banerji, Esq., Sessions Judge of Cuttack, dated the 10th December, 1936, modifying the order of P. C. Patra, Esq., Magistrate 1st class, Cuttack, dated the 13th September, 1935.