APPELLATE CRIMINAL.

1921

Nov. 13.

Before Mr. Justice Abdul Qadir.

MUHAMMAD - *Appellant,*

versus

THE CROWN—*Respondent.*

Criminal Appeal No. 637 of 1921.

Indian Penal Code, section 460—whether applicable where death was caused by some of the companions of the accused while running away after committing house trespass by night.

The accused appellant was one of a party of 4 men who broke into the house of the complainant by night and, being discovered, were running away when a neighbour caught hold of the accused whereupon some of his companions inflicted certain injuries upon the neighbour of which he died on the spot.

Held, that section 460 of the Penal Code was not applicable as the expression "at the time of the committing of house-breaking at night" must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time.

Jaffir v. *The Empress* (1), per Plowden J., followed.

Appeal from the order of E. R. Anderson, Esquire, Additional Sessions Judge, Montgomery, dated the 30th June 1921, convicting the appellant.

MUHAMMAD IQBAL, for Appellant.

NEMO., for Respondent.

ABDUL QADIR, J.—One Muhammad was committed to the Sessions on a charge under section 302, Indian Penal Code, and there was a charge in the alternative under section 460, Indian Penal Code. The Sessions Judge has acquitted him of the graver charge, in agreement with the opinion expressed by the assessors, but has convicted him of an offence under section 460, Indian Penal Code, and sentenced him to rigorous imprisonment for seven years, including three months' solitary confinement. Against this conviction and sentence he has preferred an appeal

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through Dr. Muhammad Iqbal, who argues that section 460, Indian Penal Code, is not applicable and that the sentence awarded may be reduced if the conviction is altered to one under any other section.

The facts of the case are fully stated in the judgment of the learned Sessions Judge and may be only briefly summarised here. On the night of the 16th April 1921, there was a burglary in the village Khajjian where four thieves broke into the house of Phallu by effecting a breach in the wall of his house. He was awakened by a noise and saw three men standing outside the breach and a fourth man just coming out of the hole. The three men ran away when they saw him, but he secured the man whom he had noticed coming out of the breach in the wall. The other three returned to rescue the captured man and succeeded in rescuing him by beating Phallu with sticks. All the four burglars were running away when certain neighbours of Phallu arrived, including Hassu, deceased. Hassu is said to have caught hold of the same man who had been rescued from Phallu, but he received certain injuries of which he died on the spot. The story of the prosecution was that the captured man, who is the present appellant, had an iron implement of house-breaking, called *sandhewa* in his hand when he was caught and he thrust it with both his hands into the ribs of Hassu and thereby caused his death. It was on the basis of this story that Muhammad was charged with the offence of murder. The medical evidence in the case, however, showed that this story was not true. The three injuries caused to the deceased were all contused injuries resulting from blows by a blunt weapon like a *dang* or a *lathi* and the iron implement which had a pointed sharp edge was not found to have been thrust in the manner described by the eye-witnesses. The Court accepted the theory that Hassu must have been beaten by the companions of Muhammad, who could not probably rescue him as a number of villagers arrived. It has not been held that any of the injuries to the deceased was caused by Muhammad and he was therefore acquitted of the charge under section 302, Indian Penal Code. In convicting him under section 460, Indian Penal Code, the Court observed that—

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"As death was caused in the commission of the house-breaking the accused as one of the gang of thieves is guilty under section 460, Indian Penal Code."

Dr. Muhammad Iqbal's contention is that the offence of house-breaking by night had been completed when Hassu arrived on the scene. The thieves were admittedly running away when Hassu tried to catch one of them and any injury that was caused to him by any companion of Muhammad could not be said to be caused at the time of committing the house-breaking or the house trespass in question. I think this contention must prevail. It was held by Plowden, J., in a ruling published as *Jaffir* v. *The Empress* (1) in a similar case that—

"Section 460, Indian Penal Code, was not applicable as the expression in that section at the time of the committing of house-breaking by night must be limited to the time during which the criminal trespass continues which forms an element in house-trespass, which is itself essential to house-breaking, and cannot be extended so as to include any prior or subsequent time."

This authority appears to be on all fours with the present case and I hold that the conviction under section 460, Indian Penal Code, is not correct and cannot be maintained.

There remains the question as to what other offence has been committed by the appellant. His learned Counsel does not dispute the fact that the appellant was caught at the spot immediately after the burglary. There can be no doubt that he was one of the burglars. It is argued, however, that this offence falls only under section 456, Indian Penal Code, being simple house-breaking by night, as there is no finding as to the intention with which the house-breaking was committed. It is obvious that if it were presumed that the four men came with the intention of committing theft an offence under section 457, Indian Penal Code, would be clearly constituted and considering that the thieves had *dangs* in their hands section 458, Indian Penal Code, would also be applicable, as that would amount to having made preparation for causing hurt to any person. Dr. Iqbal urges that there is no convincing evidence that his client was armed with a *dang*. From

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the discrepant evidence produced by the prosecution it cannot be concluded that the possession of a *dang* by the appellant is proved. It is not unlikely that he was empty-handed when he crawled out of the breach in the wall and as he was the only one of the culprits who was arrested, the prosecution witnesses in their anxiety to have some one punished for the death of Hassu began to attribute to him the possession first of the iron implement and then of a *dang* in addition to that implement. Sardara, P. W. 2, says—

"the accused had a *dang* in his hand as well....The *sandhewa* was in one hand and the *dang* in the other."

This describes a somewhat impossible position for a man who has been caught on crawling out of a hole in a wall. A *dang* and a *sandhewa* are said to have been found lying near the breach when the Police arrived and may have been left there by any of the four men. Phallu, P. W. 4, says —

"accused had a *dang* in his hand but did not strike Hassu with it * * * * When the accused issued from the breach he had the *sandhewa* in his hand but not the *dang*. When he escaped from me he had only the *sandhewa* in his hand. I did not see the *dang* in his hand when Hassu seized him."

Allu (P. W. 5), son of Hassu, deceased, does not say that the appellant had any *dang* and adds that the *dang* was found on the ground. Jiwan (P. W. 6) also states that the *dang* in Court was near the breach. It cannot be said, therefore, that the appellant had been armed with a *dang* or had made preparation for causing hurt before he came to commit the offence. This view of the evidence may possibly exclude the applicability of section 458, Indian Penal Code, to the offence committed by Muhammad, but I cannot accept the argument that the offence was only one under section 456, Indian Penal Code. I think an offence under section 457, Indian Penal Code, is clearly made out against the appellant. The presence of the *sandhewa* on the spot and the breach in the wall leave no doubt as to the intention with which the house-breaking was committed and I think the intention of theft can be very safely presumed. The Court below did not record a finding on that point because it held the offence to be one under section 460, Indian Penal Code. I hold that the appellant is guilty of an offence under section 457, Indian

Penal Code, and though he was not charged with that offence, I do not think he can be prejudiced by his conviction being altered to one under section 457, Indian Penal Code. As it has been held that he was not directly responsible for the death of Hassu and as constructive responsibility is ruled out by the exclusion of section 460, Indian Penal Code, a reduction of the sentence awarded against him seems to be called for and his sentence is hereby reduced to one of four years' rigorous imprisonment for an offence under section 457, Indian Penal Code. To this extent his appeal is accepted.

Appeal accepted in part.

APPELLATE CIVIL.

Before Mr. Justice LeRossignol and Mr. Justice Campbell.

GURBAKHSH SINGH—(PLAINTIFF)
Appellant

versus

Mst. PARTAPO AND ANOTHER—(DEFENDANTS)
Respondents.

1921
Nov. 16.

Civil Appeal No. 1551 of 1918.

Custom—Adoption—of daughter's son—Dhanoi Jats—tahsil *Kharar, district Ambala*—Wajib-ul arz—*value of.*

Held, that by custom among *Dhanoi Jats* of *tahsil* Kharar the adoption of a daughter's son is valid.

Sunder Singh v. Mst. *Mano* (1), followed.

Ralla v. *Budha* (2), referred to and distinguished.

Held also, that a *Wajib-ul-arz* being part of a Revenue Record is of greater authority than a *Riwaj-i-am* which is of general application and is not drawn up in respect of individual villages.

Second appeal from the decree of Lt.-Colonel B. O. Roe, District Judge, Ambala, dated the 2nd February 1918, affirming that of Lala *Rangi Lal, Subordinate Judge,* 1s *Class, Rupar, dated the 21st November 1917, dismissing the plaintiff's suit.*

(1) 63 P. R. 1888, (2) 50 P. R. 1893 (F. B.).