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fact sold. Under these circumstances, the plaintiff is now entitled only to a declaration, that he has a good and valid mortgage on the property, the subject-matter of the suit, for the amounts justly due and owing on foot of the mortgages of the 25th July, 1866, and 19th September, 1870, respectively, and that by virtue of the execution sale to the defendants Nos. 2 and 3 they are only entitled to the said property subject to such mortgages. There is no prayer for an account of the mortgages to be taken, or for a foreclosure or sale. And accordingly no relief of that nature can be given in the present suit. I am, therefore, of opinion, that the decree of this Court must be that the decree of the District Judge should be reversed, and a declaration made as above set forth, and that the respondents should pay the appellant the costs of the suit and of both appeals.

Decree reversed.

FULL BENCH.

APPELLATE CRIMINAL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Parsons, and Mr. Justice Telang.

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December 19.

QUEEN-EMPRESS, *v.* BA'NA PUNJA AND OTHERS.*

Penal Code (Act XLV of 1860), Secs. 71, 148, 149, 326—Sentence—Separate sentences for rioting and grievous hurt.

When a prisoner is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of section 149 of the Indian Penal Code, it is not illegal to pass two sentences, one for riot, and one for hurt; provided the total punishment does not exceed the maximum which the Court might pass for any one of the offences.

When, however, the accused is guilty of rioting, and is also found to have himself caused the hurt, he may be punished both for rioting and for hurt.

In such a case the total punishment can legally exceed the maximum which the Court might pass for any one of the offences.

Queen-Empress v. *Rám Sarup* (1) approved.

THIS was a reference to the Full Bench.

* Criminal Appeal, No. 101 of 1892.

(1) I. L. R., 7 All., 757.

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The accused Bána Punja and nine others were committed to the Court of Session on the following charges:—

(1) For having on the 9th June, 1891, joined an unlawful assembly armed with deadly weapons (Penal Code, section 14).

(2) For rioting armed with deadly weapons (Penal Code section 148).

(3) For voluntarily causing grievous hurt by dangerous weapons (Penal Code, section 326).

The Joint Sessions Judge of Kaira convicted all the accused of the offence of voluntarily causing grievous hurt with dangerous weapons, and sentenced, under sections 326 and 149 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to six months' rigorous imprisonment.

Accused Nos. 1, 5, 9 and 10 were also convicted of the offence of rioting, armed with deadly weapons, and sentenced, under section 148 of the Indian Penal Code, accused No. 1 to three months' rigorous imprisonment and the rest to eighteen months' rigorous imprisonment.

Accused Nos. 2, 3, 4, 6, 7 and 8 were also convicted of rioting and sentenced, under section 147 of the Indian Penal Code, to six months' rigorous imprisonment.

The sentences for each of the offences were to begin one upon the expiration of the other.

Against these convictions and sentences the accused appealed to the High Court, contending *(inter alia)* that the cumulative sentences under sections 147, 148 and 326 were illegal, and contrary to section 71 of the Indian Penal Code.

Chitgupi (with him *Shivrám V. Bhandárkar*) for the accused.

Starling (with him Ráo Sáheb *Vásudev J. Kirtikar*, Government Pleader) for the Crown.

The following authorities were referred to in argument:—

Empress v. *Rám Partáb*[1]; *Nilmony Poddar* v. *Queen-Empress*[2]; *Queen-Empress* v. *Bisheshar*[3]; *Queen-Empress* v.

(1) I. L. R., 6 All., 121. (2) I. L. R., 16 Calc., 442.
(3) I. L. R., 9 All., 645.

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Sakhárám Bháu[1]; *Ferasat* v. *Queen-Empress*[2]; *Reg.* v. *Tukaya*[3]; *Queen-Empress* v. *Dungar Singh*[4]; *Queen-Empress* v. *Rám Sarup*[5].

The case was argued before a Division Bench composed of Jardine and Telang, JJ., who made the following reference to a Full Bench.

JARDINE, J.:—This appeal has been fully argued; and we see no reason to differ with the view of the facts taken by the Joint Sessions Judge and the Assessors. The defence of *alibi* has not been made out. The object for which the prisoners assembled was unlawful. This was to enforce a right, or supposed right, to take earth from a dry tank by a show of force: and, as the Joint Sessions Judge remarks, it is immaterial, in point of law, whether the right existed or not—*Ganouri Lál Das* v. *Queen-Empress* [6] They have all been rightly convicted of rioting, and the prisoners Nos. 1, 5 and 9, who had swords, and No. 10, who shot an arrow, under section 148 of the Penal Code. One man, Pattar Nathu, was killed by a person not yet arrested: the witnesses Sona and Mundas, (exhibits 17 and 30), each had bones fractured, and Gaman and Jhála (exhibits 19 and 22) received wounds said by the hospital assistant to be dangerous to life. The murder of Pattar is found by the Judge to be the act of one man, and not done in pursuance of the common object of the rioters. The other four persons above mentioned received injuries which are grievous hurts: and as some of them were caused by swords, and all of the prisoners were rightly held guilty of them under section 149 of the Penal Code, they were all rightly convicted under section 326.

They were not specifically charged with causing any of these different hurts, nor were those of the prisoners, who are alleged to have caused these different hurts, specifically charged with so doing, although there is evidence as to how, and by whom, these different hurts were caused, as also regarding other hurts, not grievous, caused to other persons by these rioters. No objection

(1) I. L. R., 10 Bom., 493.
(2) I. L. R., 19 Calc., 105.
(3) I. L. R., 1 Bom., 214.
(4) I. L. R., 7 All., 29.
(5) *Ibid.*, 757.
(6) I. L. R., 16 Calc., 206.

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has been made that the prisoners have been prejudiced, nor has any objection on matter of law been taken to the convictions. The committing Magistrate and the Joint Sessions Judge appear to have assumed that as section 149 applied to the case, it was unnecessary to put specifications into the charge.

But, as regards the sentences passed, Mr. Chitgupi, as counsel for the appellants, urged that although a sentence under section 326 of the Penal Code is legal, and one under section 147 or 148 is legal, on the Judge's view of the facts, it was illegal to pass sentences on the same person under both section 326 and section 147 or 148. This procedure, he argued, is contrary to section 71 as interpreted in the case of *Empress* v. *Rám Partáb* (1) and by the majority of the Full Bench in *Nilmony Paddar* v. *Queen-Empress* (2). Mr. Starling, who appeared for the Crown, cited *Queen-Empress* v. *Bisheshar* (3) and *Ferast* v. *Queen-Empress* (4). He also referred to *Queen-Empress* v. *Sakhárám Bháu* (5). During the hearing the Court referred to the following cases:— *Regina* v. *Tukaya* (6), *Queen-Empress* v. *Dungar Singh* (7), *Queen-Empress* v. *Rám Sarup* (8) and *In the matter of the petition of Káli Roy and others* v. *The Queen-Empress* (9).

In the case before us, the total punishment inflicted on each prisoner is less than the maximum which may be imposed under section 326. We have now to consider the decisions above mentioned. In *Rám Partáb's case*, Straight, J., noticed that there was no evidence that the prisoners individually inflicted grievous hurt upon any person, and he says "it is only by praying in aid the provisions of section 149 of the Indian Penal Code that he can be held responsible for the injuries inflicted on the parties assaulted by the other members of the unlawful assembly with which he was associated." He held the sentence for the hurt under section 325 legal, but considered that the prisoner was made statutably responsible for the hurt inflicted by another

(1) I. L. R., 6 All., 121.
(2) I. L. R., 16 Calc., 442.
(3) I. L. R., 9 All., 645.
(4) I. L. R., 19 Calc., 105.
(5) I. L. R., 10 Bom., 493.
(6) I. L. R., 1 Bom., 244.
(7) I. L. R., 7 All., 29.
(8) I. L. R., 7 All., 757.
(9) I. L. R., 16 Calc., 725.

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man's hand, under section 149, as the prisoner was at the time "member of the unlawful assembly." But as membership of the unlawful assembly enters into the definition of rioting, he held the sentence under section 147 for rioting to be illegal, although the total punishment did not exceed the maximum under section 325.

In *Queen-Empress* v. *Dungar Singh* [1], Mr. Justice Brodhurst dissented entirely from these views, and pointed out that they were contrary to the previous decisions and the practice. After reviewing the differences between section 454 of the Criminal Procedure Code of 1872 and section 235 of the Code of 1882, the effect of section 35 thereof and the amendment made in section 71 of the Penal Code, that learned Judge observed at page 34: "The effence of rioting and the offences of voluntarily causing hurt and voluntarily causing grievous hurt, each of the two latter offences being committed against a different person, are all distinct offences. The offence of voluntarily causing hurt or of voluntarily causing grievous hurt obviously can be committed without the commission of the offence of rioting, and, in like manner, rioting can be committed without the commission of the two other mentioned offences." He held also that the prisoner might receive the cumulative sentences, the various maximum imprisonments as awardable under each of the sections 148, 323 and 326, the offence against the public tranquillity in rioting being different in kind from the injuries inflicted on individuals. He noticed that the word "punished" had been omitted from section 235 of the Criminal Procedure Code, and adopted the reasoning of Mr. Mayne that the rules about assessment of punishment are now to be sought in section 71 of the Penal Code. The same view has been adopted by this High Court in *Queen-Empress* v. *Sakhárám Bháu* [2], which case has been followed here ever since and accepted by two other High Courts[3]. As one of the Judges in that case, I would express my opinion that it supports the view of Brodhurst, J., although it is to be noticed that illustration G, which allows separate convictions under sections 147, 325 and 142 of the Penal Code, is,

(1) I. L. R., 7 All., 29. (2) I. L. R., 10 Bom., 493.
(3) I. L. R., 10 All., 146, and I. L. R., 12 Mad., 36.

in *both* the Procedure Codes of 1872 and 1882, an illustration of the first paragraph of section 454 of the one and section 235 of the other.

In *Queen-Empress* v. *Rám Sárup* [1], where the separate convictions under sections 147 and 325 did not, when combined, exceed the maximum under either, Brodhurst, J., adhered to his opinion in the earlier case. The majority of the Bench (Petheram, C. J., Straight and Tyrell, JJ.) allowed the sentences to stand, distinguishing the case from that of *Rám Partáb* on the ground that the hurt committed by the sentenced prisoner with his own hands was a distinct offence, "separate from and independent of the offence of riot, which was already completed. The fact of the riot was not an essential portion of the evidence necessary to establish their legal responsibility under section 325 of the Penal Code."

In *Queen-Empress* v. *Bisheshar* [2] decided by Sir J. Edge, C. J., and Brodhurst, J., the whole subject is discussed by the Chief Justice. The case is very like the present, and the total sentences under sections 147 and 325 were within the maximum of section 325. They were held to be legal. The Court considered that section 71 did not apply. The judgment seems to hold, as I do, that in *Rám Partáb's case*, Straight, J., treated the word "punishment" in section 71 as equivalent to "sentence." The Chief Justice points out that the Legislature does not use the word "sentence." Alluding to the illustrations to section 235 of the Procedure Code, he remarks: "There would be little use in inquiring into and convicting an accused person of two offences if he could be legally sentenced for one only." He mentions that *Regina* v. *Tukáya* [3] has a bearing on the case. Even if section 71 of the Penal Code were applicable, the total punishment being within the limit allowed was legal, as has been urged in the present case by Mr. Starling. But Sir John Edge holds that section 71 does not apply at all, seeing that section 149 does not, in his opinion, create any offence, but is, like section 34, merely declaratory of a principle of the common law of England, and differs in principle from sectio-

(1) I. L. R., 7 All., 757. (2) I. L. R., 9 All., 645.
(3) I. L. R., 1 Bom., 214.

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396, relating to dacoity with murder, which does create a substantive and distinct offence. Compare section 114 with the reasons for the doctrine given in Plowden's Reports, p. 97. The strong inclination of my opinion is to Sir John Edge's view. Section 149 follows Lord Holt's judgment in *Plummer's case*, reported in Kelynge and discussed in Foster's Crown Law, 353. Also Mr. Justice Foster's charge at the trial of William Jackson, 18 Howell's State Trials, 1069.

I am of opinion that, if we follow Sir John Edge and Brodhurst J.'s views of the law, we must hold that the words about punishment in section 71 are not equivalent to directions about mere sentences; that section 71 is not applicable, and that, even if it does apply, the punishments inflicted are below the maximum, and, therefore, legal. I have found no reported decision of this Court, but in Criminal Appeal, No. 217 of 1889 [1], Scott and Candy, JJ., followed *Rám Partáb's case* and reversed a sentence for rioting, although the total punishment was within the limit allowed for the hurt. No Madras case has been cited.

It remains to consider the decisions at Calcutta. In *Loke Náth Sarkár's case* [2], Tottenham and Ghose, JJ., held that section 71 did not apply. There the several hurts had been inflicted in the riot, and the convictions were under section 148, section 324 read with section 149, and section 324 for hurt caused by a particular prisoner. The aggregate punishment of the appellants exceeded the limits of section 324 and section 148. The separate sentences were upheld, following *Queen-Empress* v. *Dungar Singh*. At page 353 the learned Judges say:—

"It seems to us that the present case does not come within the purview of section 71. The offences, of which the prisoners have been convicted, are distinct: (1) rioting armed with deadly weapons; (2) voluntarily causing hurt with a dangerous weapon to Kamala Kant Poddar; (3) a similar offence with regard to Joydhur.

"The several acts, in support of which the prisoners were charged, do not, in combination, form any other offence defined

[1] Criminal Ruling 63 of 21st Nov. 1889, Col. 154 of Rancholdlál's Criminal

[2] I. L. R., 11 Calc., 349.

by any law with which we are acquainted ; nor do they fulfil any other condition of section 71, which would protect the accused from more than one punishment, or limit the severity of the sentence passed upon them.

"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case, then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding ; for rioting was being committed before the hurts were inflicted on the two men wounded.

"We note that the view of the law which we have taken was adopted by the High Court at Allahabad in the recent case of *Queen-Empress* v. *Dungar Singh.*"

In *Nilmony Poddar* v. *Queen-Empress* (1), the appellants were sentenced under section 148 to three years' imprisonment and under section 324 coupled with section 149 to one year. The aggregate thus exceeded the limit of either section. They had not by their own hands caused any hurt. The majority of the Full Bench (Petheram, C. J., Mitter, Prinsep and Wilson, JJ.,) followed *Rám Partáb's case*, and held that paragraph 1 of section 71 applied, and set aside the sentences of one year. They appear to treat section 149 as an ingredient in the offence punished by section 324 coupled with section 149. The case of *Queen-Empress* v. *Bisheshar* does not appear to have been brought to the notice of the Court. Tottenham, J., differed from his colleagues and held that section 149 did not make a divisible part of the offence under section 324, and that it did not define or make punishable any specific offence. He evidently treats section 149 as a mere declaration of a doctrine of law or legal principle.

In *Mohur Mir's case* (2), one prisoner, Kali Roy, had been sentenced under sections 147 and 323 to a punishment higher than either section provides. The Court (Trevelyan and Beverley, JJ.) upheld the sentences on the authority of *Rám Sarup's case*, as the prisoners had individually committed the hurts.

(1) I. L. R., 16 Calc., 442. (2) I. L. R., 16 Calc., 725.

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The latest case is *Ferasat* v. *Queen-Empress*[1] decided by Beverley and Ameer Ali, JJ. The report is not very clear, and there is no mention of section 149. What is said at pages 110 and 111 seems to show that the prisoners sentenced under sections 148 and and 332 to a punishment exceeding the maxmium provided for either offence had individually committed the hurt. The Court held that section 71 had no application, and that the sentences were legal. The ruling follows *Rám Partáb's case* in holding that separate sentences may be passed for rioting and hurt when the person sentenced did individually commit the hurt. It follows *Loke Náth's case* in holding that in such a case the minimum aggregate provided by section 71 is not an obligatory minimum.

The result of the decisions seems to be as follows:—Sir J. Edge, C. J., Brodhurst, Tottenham and Ghose, JJ., considered that rioting and hurt are distinct offences; that it is immaterial whether section 149 is called in or not, and section 71 does not apply at all either to prohibit two separate sentences or to impose a minimum on the total of punishment. The cases are Dungar Singh's, Bisheshar's and Loke Náth's.

Mr. Justice Straight in *Rám Partáb's case* went the length of holding separate sentences illegal when the conviction for hurt depended on section 149, even though the minimum punishment allowed by section 71 had not been exceeded. No other reported case has gone so far.

Sir C. Petheram, C.J., Straight, Tyrell, Mitter, Prinsep and Wilson, JJ., limit the application of *Rám Sarup's case* to cases where section 149 has to be called in, and do not apply section 71 to the prisoner, who, during the riot, has himself committed the hurt. The cases are those of Rám Sarup and Nilmony. Trevelyan, Beverley and Ameer Ali, JJ., agree in the non-application of section 71 where the rioter sentenced has himself inflicted the hurt. See *Mohur Mír's and Ferasat's cases.*

In *Loke Náth's case,* a view of the law is stated as follows:—"If it had been found that the causing of hurt was the force or violence which alone constituted the rioting in the present case,

(1) I. L. R., 19 Calc., 105.

then we should be prepared to hold that the prisoners could not be punished both for causing hurt and for rioting. But the facts of the case do not warrant such a finding; for rioting was being committed before the hurts were inflicted on the two men wounded." This proposition is not assented to in *Mohur Mir's case* and is distinctly dissented from by Sir John Edge at page 651 of the report, I. L. R., 9 All., in *Bisheshar's case* for reasons which at present commend themselves to me. I do not think it necessary to consider the proposition in determining the present case, as it has not been put forward as a defence for any of the prisoners. Neither has it been argued. I would add, however, that force and violence have not the same meaning as, and are not commensurate with, the word "hurt" in the Indian Penal Code, and that probably the burden of proving a fact exempting, from ordinary punishment, an accused person guilty of both riot and hurt,—I mean a fact bringing the case within section 71, assuming that section to apply,—would lie on the accused person under section 105 of the Evidence Act.

The inclination of my opinion is to hold that the words in section 71 of the Penal Code about punishment are not equivalent to prohibitions of separate sentences: that section 71 does not apply at all either to forbid two sentences, one for the hurt and one for the riot, or to require that the total punishment shall not exceed the maximum of one offence: that it matters not in this regard whether the prisoner did the hurt with his own hand, or is found guilty by applying the doctrine of section 149.

But as learned Judges in the High Courts at Calcutta and Allahabad have differed in their views of the law, and the questions are of great importance and frequently occur in cases like the present, I think we should refer the following points of law to a Full Bench before we determine the appeal:—

1. Whether where the prisoner is convicted of rioting and of hurt, and the conviction for hurt depends on the application of section 149 of the Indian Penal Code, it is illegal to pass two sentences, one for rioting and one for hurt?

2. Whether in such a case the two sentences are legal, provided the total punishment does not exceed the limit which the Court might pass for any one of the offences?

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(1) I. L. R., 19 Calc., 105.

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1. Whether where the prisoner is convicted of rioting and of hurt, and the conviction for hurt depends on the application of section 149 of the Indian Penal Code, it is illegal to pass two sentences, one for rioting and one for hurt?

2. Whether in such a case the two sentences are legal, provided the total punishment does not exceed the limit which the Court might pass for any one of the offences?

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3. Whether the two sentences are legal where the prisoner sentenced is proved to have himself caused the hurt?

4. Whether in such a case the total punishment can legally exceed the limit which the Court might pass for any one of the offences?

TELANG, J.:—I concur in the proposed reference to a Full Bench.

The judgment of the Full Bench (Sargent, C. J., Parsons and Telang, JJ.) was delivered by

SARGENT, C. J.:—We think that the first question should be answered in the negative and the third in the affirmative. This is quite independent of the question whether the case assumed by the first question falls under section 71 of the Penal Code, as we agree in the view taken by Mr. Mayne, at page 44 of his Commentaries on the Penal Code, of the combined effect of section 71 of the Penal Code and section 235 of the Criminal Procedure Code, *viz.*, that the assessment of punishment is to be found in the former section in cases falling within it; but the latter determines the procedure quite independent of it, and this Court has already ruled that, in case of separate convictions for two distinct offences in the same case, the proper course is to pass a separate sentence for each offence[1].

With respect to the second and fourth questions, they turn upon the meaning to be given to section 71 of the Penal Code. As to question 2, it can only be answered in the affirmative, whether section 71 of the Penal Code be thought applicable to the case as was held by the Allahabad High Court in *Empress* v. *Rám Partáb*[2] and the Calcutta High Court in *Nilmony Poddar* v. *Queen-Empress*[3] or not applicable as was held by Sir John Edge, C. J., in *Queen-Empress* v. *Bisheshar*[4]. Question 4 must be answered in the affirmative. We agree in the decision in *Queen-Empress* v. *Rám Sarup*[5].

(1) Cr. Rul. No. 17, dated 28th March 1892.
(2) I. L. R., 6 All., 121.
(3) I. L. R., 16 Calc., 442.
(4) I. L. R., 9 All., 645.
(5) I. L. R., 7 All., 757.