

# CASES

DETERMINED BY

## THE HIGH COURT OF JUDICATURE

AT FORT WILLIAM IN BENGAL,

IN ITS

APPELLATE JURISDICTION.

### CRIMINAL.

*Before Mr. Justice Norman and Mr. Justice E. Jackson.*

THE QUEEN *v.* KABIL CAZEE AND OTHERS (PRISONERS.)

*Unlawful Assembly—Common Object—Murder.*

1869  
April 8.

A large body of men belonging to one faction, way-laid another body of men belonging to a second faction, and a fight ensued, in the course of which, a member of the first mentioned faction was wounded and retired to the side of the road, taking no further active part in the affray. After his retirement a member of the second faction was killed.

*Held*, by NORMAN, J. (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded and that he could not, under section 149 of the Penal Code, be made liable for the subsequent murder.

*Held*, by E. JACKSON, J., that he remained a member of the unlawful assembly.

Mr. Mackenzie and Baboo Ummoranath Bose for the prisoners.

The facts are stated in the judgment of

NORMAN, J.—The prisoners have been convicted of the murder of Baber Ali Mira, and severally sentenced to transportation for life.

The facts are that, on the 25th of Baisakh last, about seventy or eighty persons belonging to a *dol* or party in Mouzah Bhoj-pore, called the Miras, were proceeding to a feast, to which they had been invited by the widow of Baboo Jan Shurif and Jijir

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Jan Shurif. They were in a body, headed by the deceased man Baber Ali Mira. It had been rumoured in the village for some days previously that if the Miras went to the feast, there would be a disturbance.

At a point where the road divides into two branches, each of which leads to the house to which the Miras were proceeding, they were intercepted by a body of from 100 to 120 men, of the *dol* or faction of the Cazees, of which the prisoner, Kabil Cazees is a leader. The Cazees came out of an empty homestead, where they had been seen sitting together in a body under a tamarind tree; many of the Cazees were armed with spears and shields; some with *tentas* or three-pronged spears used for taking fish. They refused to allow the Miras to pass. After some altercation, one of the Miras called out "*mar salaka.*" The two parties then began to throw clods of earth at each other, and fight with *lattees*. Baber Ali Mira, who carried a gun, then stooped down and fired amongst the Cazees. On his firing, the Cazees retreated a little. The prisoner, Wahid Ali, separated himself from his party, and went a short way, a witness says some 10 or 15 cubits to the south-west, and sat down. He was wounded by the shot in the feet; and blood was flowing from each foot. The parties again commenced fighting; and in the *melee*, Baber Ali Mira was stabbed through the heart by a fish spear; and Baboo Allah wounded Kurban severely with a spear on the hip.

The prisoners appeal. And we have heard Mr. Mackenzi and Baboo Ummurnath Bose on their behalf.

We have no doubt of the propriety of the conviction of all the prisoners, except Wahid Ali. No aggression could be more wanton or deliberate than the attack on the Miras. In the month of Falgun, the widows had entertained the Cazees and all the other *dols* in the mouzah, except the Miras who were then excluded, because the Cazees said they could not go to the feast if the Miras were invited. The Miras were invited to a separate feast, in order that there might be no opportunity for a quarrel. A considerable number of the Cazees were armed with spears and other deadly weapons, to say nothing of *lattees*, while only two or three of the other party were so armed,

The evidence shews that, on the retreat of the Cazees, and before the renewal of the combat in which Baber Ali Mira was killed, the prisoner Wahid Ali had separated himself from his faction and sat down apart from them. He probably no longer had the same common object, as the members of the unlawful assembly from which he had so separated himself. It does not appear that he continued to urge on the others. He was apparently solely occupied by his own sufferings. He cannot be convicted under section 149, unless he was a member of the unlawful assembly at the time of the committing the offence. We think the fair inference from the facts is that he had ceased to be so when the fatal wound was inflicted on Baber Ali Mira, and therefore that he cannot be convicted or punished for an act committed by a member of that assembly under section 149. It is plain that he was no longer co-operating with the others, and he had not the power to prevent or check the violence of the others, as he might have had, if he had continued with them.

We reverse the conviction of murder against Wahid Ali. It is not shewn that Wahid Ali was armed with any deadly weapon. We, therefore, think he should have been convicted of rioting under section 147. We convict him accordingly, and sentence him to two years' rigorous imprisonment.

JACKSON, J.—I concur in the order my learned colleague would pass in this case, except as regards Wahid Ali. I am inclined to the opinion that he still remained a member of the unlawful assembly, and so far liable for the acts of its members, even when he was sitting down wounded a few paces on one side of those who were actively participating in the fight. In the commencement of the fight, he had been in the thick of it. He was wounded by some shot from a gun; and during the momentary cessation of the fight which followed on the firing of the gun, he managed to leave the rest of the rioters so far as to be out of the actual hand-to-hand fight which recommenced, and in the course of which, a man was killed outright. But I think he still remained a member of the illegal assembly.

The opinion of my colleague, as the senior Judge will however prevail, and the sentence passed on Wahid Ali, will be reduced to two years' rigorous imprisonment.