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Jan. 24.

# KAPILDEO SINGH

*v.*

# THE KING

[SIR FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN and MUKHERJEA JJ.]

*Federal Court—Practice—Criminal Appeals—Interference with Judgment of Lower Court—Guiding principle—Indian Penal Code (XLV of 1860), s. 147—Rioting and Unlawful Assembly—Conviction of less than five persons and acquittal of others—Legality—Common object, proof of.*

Though the Federal Court of India is not bound by the Privy Council practice and precedents after the enactment of The Abolition of Privy Council Jurisdiction Act, 1949, it will not depart from the principles which have been laid down by the Privy Council defining the limits within which interference with the course of criminal justice dispensed in the subordinate courts is warranted.

*Riel* v. *The Queen* (10 A.C. 675), *In re Abraham Mallory Dillet* (12 A.C. 459), *Ibrahim* v. *The King* (1914 A.C. 599) and other cases referred to.

The essential question in a case under s. 147, Indian Penal Code, is whether there was an unlawful assembly as defined in that section of five or more persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused and, even when it is possible to convict less than five persons only, s. 147 still applies, if upon the evidence in the case the Court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified.

Where the charge against the accused was that they "were members of an unlawful assembly and in the prosecution of the common object of that assembly, *viz.*, in dispossessing A and to assault and murder B and others and committed the offence of rioting and thereby committed an offence punishable under s. 147 of the Indian Penal Code" and the accused were convicted under s. 147 of the Code without arriving at a finding as to whether A was in possession, on the assumption that the question of possession was immaterial inasmuch as "both sides were determined to vindicate their rights by show of force or use of force":

*Held*, that inasmuch as the dispossession of A was the most important of the common objects set out in the charge and the others were more or less subsidiary to it, and the charge would have failed if it was found that the accused and not A was in fact in possession and such a finding would also have seriously

affected the second common object of assault in view of the accused's right of private defence, conviction of the accused without coming to a finding as to whether A was in possession or not was apt to lead to injustice of such a serious and substantial character as to warrant the interference of the Court. [The conviction and sentence were accordingly set aside and the case was remanded to the High Court with a direction that the appeal be reheard and disposed of according to law after recording a definite finding on the question of possession].

APPEAL by special leave granted by the Federal Court on 1st November, 1949, from the judgment dated the 26th August, 1949, of the Patna High Court in Criminal Appeal No. 264 of 1949: Criminal Appeal No. 1 of 1949.

*H. J. Umrigar* (*Thakur Prasad* with him) for the appellant.

1950. Jan. 24. The judgment of the Court was delivered by

MAHAJAN J.—This is an appeal by special leave against an order of the High Court at Patna affirming the conviction of the appellant by the Additional Sessions Judge, Arrah, under s. 147 of the Indian Penal Code. *Mahajan J.*

The appellant was charged along with 13 others with having been a member of an unlawful assembly "with the common object of dispossessing one Chulhan Tewari (the complainant) and assaulting and murdering one Nasiba Ahir and others" and with having committed, in furtherance of that common object, offences under ss. 302, 326 and 147 read with s. 149 of the Indian Penal Code. The prosecution case was that the appellant led a party of 60 or 70 men armed with a gun and lathis to the scene of occurrence with a view to dispossess the complainant of the land bearing survey No. 520 appertaining to Khata No. 59 in village Sikaria, which the complainant claimed to belong to him. As the mob came upon the land the complainant remonstrated against their action, when the appellant fired three shots from the gun in his hand causing injuries to Nasiba Ahir, Bhola Ahir and Lalmohar Ahir, and when they fell down the mob dispersed. The injured

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men were then taken to a hospital where Nasiba Ahir died soon after. The appellant and thirteen others who were identified were accordingly charged with having committed the offences mentioned above.

The Additional Sessions Judge of Arrah who tried the accused found that, though the apparent title to the land was in the appellant and another, its possession had long been disputed, and that it was "needless to make much of possession because neither party in my opinion can justly claim the right of private defence to property." After discussing the evidence of the eye witnesses and other materials before him he found that the gun was fired by the appellant's party while lathis or brickbats were used by the complainant's men, and as a result of such attack and counter-attack one man was injured on the side of the appellant while three men including the deceased Nasiba Ahir who were passers-by received gunshot injuries. The learned Judge rejected as unreliable the evidence of the prosecution witnesses to the effect that the appellant held the gun and fired the shots. But as the appellant's party went upon the land armed with the gun and as the persons injured were not of the complainant's party, the learned Judge convicted the appellant under the second part of s. 304 read with s. 149 and sentenced him to rigorous imprisonment for a period of five years. Though he found the appellant also guilty of rioting under s. 147, he thought that no separate sentence was called for under that section. The thirteen others who were charged along with the appellant were held not guilty in respect of any of the charges, as they were not properly identified as having taken part in the unlawful assembly, and were acquitted.

The appellant appealed to the High Court and Manohar Lal J. who heard the appeal agreed with the trial Judge that the question as to who was in actual possession of the plot at the time of the occurrence was immaterial. He held that the party of the appellant were members of an unlawful assembly and "could not plead any right whatsoever to come there and assert their possession by show of force". The learned

Judge agreed also with the finding of the trial Court that the appellant was not proved to have been armed with a gun or to have fired the shots, but he thought, in view of that finding, that " it is impossible to convict Kapildeo Singh for an offence under s. 304-149, I. P. C., when it is not the prosecution case that any other member of the mob led by Kapildeo Singh inflicted the gunshot injury on Nasiba Ahir". The learned Judge was however satisfied that the appellant was in the mob and was consequently guilty under s. 147, I. P. C. He accordingly set aside the conviction and sentence under s. 304 read with s. 149 but maintained the conviction under s. 147 and sentenced the appellant to two years' rigorous imprisonment, the trial court not having imposed any separate sentence under that section.

A petition for special leave to appeal was made to this Court, and it was admitted in view of two grounds urged by the learned counsel for the appellant: (1) that in all 14 persons having been charged with rioting and 13 of them having been acquitted, it could not be held that there was any unlawful assembly of five or more than five persons whose common object was to commit an offence; (2) that no finding having been given on the question of possession of the complainant, no common object was established and the assembly was not an unlawful one.

At the hearing of the appeal, the learned counsel raised a third contention that in the absence of a finding that any one of the members of the appellant's party was armed with a gun, the charge under s. 147 could not be sustained because in this situation there was no evidence that any member of his party actually used force or violence in prosecution of the common object.

In our opinion, the first contention is without substance. The essential question in a case under s. 147 is whether there was an unlawful assembly as defined in s. 141, I.P.C., of five or more than five persons. The identity of the persons comprising the assembly is a matter relating to the determination of the guilt of the individual accused, and, even when it is possible to

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convict less than five persons only, s. 147 still applies, if upon the evidence in the case the court is able to hold that the person or persons who have been found guilty were members of an assembly of five or more persons, known or unknown, identified or unidentified. In the present case, there is such a finding and that concludes the matter.

The third contention is of no practical importance as we have come to the conclusion on the second contention that the case should be remanded to the High Court for rehearing.

In dealing with the second contention, it is necessary to refer to the charge under s. 147, I.P.C., of which the appellant has been found to be guilty. This charge runs as follows :—

" That you, on or about the 25th day of June, 47 at B. Sakaria P. S. Sandes were members of an unlawful assembly and in prosecution of common object of such assembly, *viz.*, in dispossessing Chulhan Tewari and to assault and murder Nasiba Ahir and others and committed the offence of rioting and thereby committed an offence punishable under s. 147 of the Indian Penal Code.....".

By having the charge framed in this manner, the prosecution clearly took upon itself the onus of proving that Chulhan Tewari was in possession of the disputed land, and there can be no doubt that of the three items set out in the charge as constituting the common object of the alleged unlawful assembly, dispossession of Chulhan Tewari, the complainant, was the most important one, the other objects stated being more or less subsidiary to the former. The most important part of the charge therefore would have failed if the appellant had been found to be in possession and such a finding would have also seriously affected the case of the prosecution with regard to the second common object, *viz.*, " to assault ", because it would have at once given rise to the question as to whether the accused should be held to be protected by the law of private defence. Conversely, if Chulhan Tewari had been found to be in possession, the appellant could not have escaped conviction. Unfortunately, however, the

learned Judge who heard the appeal in the High Court did not apply himself seriously to the question of possession but proceeded on the assumption that that question was immaterial because "both sides were determined to vindicate their rights by show of force or use of force". In our opinion, the matter was not capable of being disposed of so simply and so summarily, and the law on which the learned Judge bases his opinion, would appear to have been too loosely stated, if by the use of the word "vindicate" he meant to include even cases in which a party is forced to maintain or defend his rights. Also, having regard to the nature of injuries on both sides, one party complaining that three passers-by received gunshot injuries and the other complaining that one or two persons received a few simple injuries, it is difficult to regard the occurrence as being in the nature of a determined battle between two armed mobs, in which the desire to fight and attack each other becomes a more important objective of the opposing mobs than the cause or subject-matter of the fight. We are clearly of opinion that it was incumbent on the appellate court to record a clear finding as to possession, and it is equally clear to us that its failure to record such a finding on a vital issue in the case, without deciding which the question as to who was the aggressor could not properly and satisfactorily be determined, is apt to lead to injustice of such a serious and substantial character as to warrant the interference of this Court. The conviction and sentence of the appellant are therefore set aside and the case is remanded to the High Court with the direction that the appeal be reheard and disposed of according to law after recording a definite finding on the question of possession.

This being the first appeal of its kind admitted by this Court in the exercise of its criminal jurisdiction, it seems necessary to state that though this Court is no longer bound by Privy Council practice and precedents, it sees no reason to depart from the principles which have been laid down by it defining the limits within which interference with the course of criminal justice dispensed in the subordinate courts is warranted, and

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to remove all misapprehension on the subject, it would be useful to refer to some of the cases in which those principles have been enunciated and explained.

In *Riel* v. *The Queen* (1) Lord Halsbury, while delivering the judgment of their Lordships of the Privy Council, pointed out that leave to appeal in criminal cases could only be given where some clear departure from the requirements of justice is alleged to have taken place.

In *In re Abraham Mallory Dillet* (2) it was observed that Her Majesty would not review criminal proceedings unless it be shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done. In *Ibrahim* v. *The King* (3) it was observed that the ground for His Majesty's interference in criminal matters is the violation of the principles of natural justice. In *Dal Singh* v. *King Emperor* (4) the following observations were made on the subject:—

"According to the practice of the Judicial Committee in dealing with an appeal in a criminal case, the general principle is established that the Sovereign in Council does not act in the exercise of the prerogative right to review the course of justice in criminal cases *in the free fashion of a fully constituted Court of Criminal Appeal.* The exercise of the prerogative takes place only *where it is shown that injustice of a serious and substantial character has occurred.* A mere mistake on the part of the Courts below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below."

In *Ex parte Macrea* (5) it was held that although in very special and exceptional circumstances leave to appeal in criminal cases may be granted, misdirection

(1) 10 A.C. 675.
(2) 12 A.C. 459.
(3) [1914] A.C. 599.
(4) I.L.R. 44 Cal. 876.
(5) 20 I.A. 90.

by a Judge, either in leaving a case to a jury where there is no evidence or founded on an incorrect construction of the Penal Code, even if established, is insufficient for that purpose, *especially where no miscarriage of justice has resulted.*

In *Taba Singh* v. *King Emperor*(1) Lord Buckmaster expressed regret that the pains that they have taken to make clear the rules upon which the Board will proceed in considering questions relating to criminal appeals should have been so widely misunderstood or so wholly ignored as to have permitted the presentation of the petition in that case before him and it was said that the responsibility for the administration of criminal justice in India the Board will neither accept nor share, unless there has been some violation of the principles of justice or some disregard of legal principles.

In *Easwaramurthi* v. *Emperor* (2) Lord Wright observed that in a criminal appeal brought by special leave their Lordships are not concerned with formal rules, but only with the question whether there has been a *miscarriage of justice.*

In *George Gfeller* v. *The King*(3) Sir George Rankin pointed out that for them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice and that misdirection as such, even irregularity as such, will not suffice and that there must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law.

In *Md. Afzel Khan* v. *Abdul Rahman* (4) Viscount Dunedin made similar observations.

In *Louis Edouard Lanier* v. *The King*(5) the Privy Council held that although the proceedings taken were unobjectionable in form, justice had gravely and injuriously miscarried and the sentence pronounced against the appellant formed such an invasion of liberty and such denial of his just rights as a citizen that their Lordships felt called upon to interfere.

(1) I.L.R. 48 Bom. 515. (3) A.I.R. 1943 P.C. 211. (5) 18 C.W.N. 98.
(2) A.I.R. 1944 P.C. 54. (4) A.I.R. 1932 P.C. 234.

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Following the principles laid down in these cases, this Court will not interfere lightly in criminal cases, and we have interfered in the present case, because in our opinion it can be brought within the ambit of those principles.

*Conviction set aside: case remanded.*

Agent for the appellant: *P. K. Chatterjee.*

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## MOHAMMAD AMIN BROTHERS LTD. AND OTHERS

*v.*

## DOMINION OF INDIA AND OTHERS.

[SIR HARILAL KANIA, C. J., SIR FAZL ALI, PATANJALI SASTRI, MEHR CHAND MAHAJAN and MUKHERJEA, JJ.]

*Government of India Act, 1935, s. 205 (1)—"Final order", meaning of—Order of High Court on appeal setting aside order of winding-up and directing fresh hearing of the case after determination of pending disputes relating to quantum of debt due to petitioner—Whether "Final order"—Appeal to Federal Court—Maintainability—Test of finality of orders.*

The Dominion of India, claiming that a sum of Rs. 35 lakhs was due to it from a limited company by way of income-tax and other taxes on income, applied under s. 162 of the Indian Companies Act for the compulsory winding-up of the company and an order for winding-up was passed by a Single Judge of the High Court. On appeal a Division Bench of the High Court overruled the objection raised by the company to the maintainability of the application on the ground that it related to a matter concerning revenue within the meaning of s. 226 (1) of the Government of India Act, but, finding that a *bona fide* dispute was pending before the Income-tax authorities relating to a substantial part of debt on which the application for winding-up was made and that the solvency of the company could not be determined before this dispute was decided, set aside the order of the Single Judge and remanded the case to him directing him to keep the application on the file and take it for hearing after the final determination of the dispute pending before the Income-tax authorities. An appeal was preferred to the Federal Court from this order of remand after obtaining a certificate from the High Court under s. 205 (1) of the Government of India Act that a question relating to the interpretation of the Government of India Act was involved:

*Held*, that the order appealed against was not a 'final order' or a 'judgment' within the meaning of s. 205 (1) of the Government of India Act, as it did not finally dispose of the rights of the