1891

KAILASO KOER v. RAGHU NATH SAHAN SINGH.

notice of the Court, and therefore we think that upon that ground the Subordinate Judge was right, and the appeal upon that ground fails.

The Subordinate Judge also thinks that the provisions of section 174 have not been sufficiently complied with so as to entitle the plaintiff to this relief in whatever form it is sought for. In that also we agree with him; section 174 provides that before a sale is set aside, the whole of the debt and the expenses and the damage which the purchaser has sustained shall be deposited in Court: the debt for payment to the decree-holder, the damage for payment to the purchaser. In this case the only thing which has been deposited in Court is the damage which is payable to the purchaser. The amount of the debt has not been deposited; but some person comes who says that he is the decree-holder, and admits that he has received the money. We think that that is not a compliance with the Act. We think that before a claim can be made for the protection of section 174, the Court must have the money deposited in the Court itself, so that the Court may know, of its own knowledge, that the provisions of the section have been complied with, and may not be driven to rely upon the evidence of other persons who may or may not be interested in the matter.

For both reasons then we think that the Subordinate Judge was right in the view he took of this case, and that this appeal must be dismissed with costs.

Appeal dismissed.

T. A. P.

FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Kt., Chief Justice, Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

1891 *May* 19.

QUEEN-EMPRESS *v.* NAYAMUDDIN AND OTHERS.*

Penal Code, Section 300, *clause* 5, *and Sections* 149 *and* 307—*Murder, attempt to commit—Rioting armed with deadly weapons—Pre-arranged fight.*

In a case in which it was found that all the accused were guilty of rioting armed with deadly weapons, that the fight was premeditated and

* Full Bench reference on Criminal Appeal No. 773 of 1890 against the order of the Sessions Judge of Furridpur dated the 6th September 1890.

pre-arranged, a regular pitched battle or trial of strength between the two parties concerned in the riot, and that one of the accused in the course of the riot, and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of exception 5 to section 300 of the Indian Penal Code.

Per curiam, held, that upon such finding the case did not fall within the exception.

Per PIGOT J. (PETHERAM, C.J., and MACPHERSON, J., concurring).—The 5th exception to section 300 should receive a strict and not a liberal construction; and in applying the exception it should be considered with reference to the act consented to or authorised, and next with reference to the person or persons authorised, and as to each of those some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) dissented from so far as they decide that from such a finding as the above consent to take the risk of death is inferred.

Per O'KINEALY, J.—Before exception 5 can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death, or take the risk of death; and that this determination continued up to, and existed at, the moment of his death. *Queen* v. *Kukier Mather* (2) observed on.

Per GHOSE, J.—No general rule of law can be laid down in determining, in cases of this description, whether the person killed or wounded suffered death or took the risk of death with his own consent; it being a question of fact, and not of law, to be decided upon the circumstances of each case as it arises. *Shamshere Khan* v. *Empress* (1) and *Queen v. Kukier Mather* (2) observed on, and the propositions of law laid down therein concurred with.

REFERENCE to a Full Bench made by PRINSEP and WILSON, JJ.

The referring order was as follows:—

"In this case the appellants, three in number, have been convicted of an attempt to murder under section 307 of the Indian Penal Code, read, in the case of two of them, with section 149. It has been found—and we see no reason to question the findings—that they were all guilty of rioting armed with deadly weapons, and that one of the accused, Nayamuddin, in the course of the riot and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that

(1) I. L. R., 6 Calc., 154.

(2) Unreported.

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

his act amounted to an attempt to murder, unless that act bears a less grave character by reason of exception 5 to section 300 of the Indian Penal Code. That exception says—'Culpable homicide is not murder when the person whose death is caused, being above the age of 18 years, suffers death or takes the risk of death with his own consent.'

"In this case it is found, and we accept the finding: 'The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men on accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one.'

"We think it a question of some difficulty whether this finding brings the offence of the appellants within the 5th exception to section 300, Indian Penal Code. And the decisions of *Empress* v. *Rohimuddin* (1) and *Shamshere Khan* v. *The Empress* (2) appear to be directly in conflict upon the point.

"If the exception does not apply to the case, the conviction and sentences appear to be right. If it does apply, the conviction should have been under section 308, Indian Penal Code, and the sentences such as are sanctioned by that section.

"We desire to refer to a Full Bench the question whether, on the finding above cited, the case falls within the 5th exception to section 300, Indian Penal Code."

Mr. *P. L. Roy* (with him Babu *Baikunt Nath Das*) for the appellants.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown.

Mr. *P. L. Roy*.—With reference to exception 5 of s. 300, I would draw attention to the first report on the Penal Code by the Indian Law Commissioners, see the reprint of the Indian Penal Code as originally framed in 1837, by Higginbottam and Company, page 256, clause 282, where the Commissioners deal with "Voluntary culpable homicide by consent," which offence they say "ought not

(1) I. L. R., 5 Calc., 31.
(2) I. L. R., 6 Calc., 154.

to be punished so severely as murder." In the draft Code just printed, a duel was given as an illustration of this offence; the Commissioners, however, considered that clause 298 as it stood included the case of a person killed in a duel as one who "suffers or takes the risk of death by his own choice. The illustration was thereupon dropped out. It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide, by the consideration of the case of *suttee*; and they had to consider whether they would rank this case as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide; following the existing law as to *suttee*, they concluded that it ought not to be treated as murder; and they had then to frame an exceptive definition, and the question would naturally arise whether the terms of the definition should be limited specially to *suttee*, or be made general enough to comprehend other cases depending upon the same principle. The result was clause 298, the terms of which are general, including all cases in which "the person whose death is caused was above twelve years of age, and suffers death or takes the risk of death by his own choice." The words of clause 298 have since been slightly altered, and are embodied in the present section 300, exception 5. Therefore we see the exception is a general one, and includes all cases depending on the same principle as *suttee*. Next as to whether the present case is one resting on that principle, the case law on this point is conflicting, that of *Empress* v. *Rohimuddin* (1) is against me; on the other hand, the case of *Shamshere Khan* v. *Empress* (2) is in my favour, in which White, J., observes on the case of the *Empress* v. *Rohimuddin*. The unreported case of the *Queen* v. *Kukier Mather* is also in my favour. In the present case before the Court the men went out armed against armed adversaries, and must have been aware that they ran the risk of death; and having voluntarily put themselves in that position, they must be taken to have consented to incur the risk. With regard to this exception, Mr. Mayne (ed. 1890), p. 288, says:—"It certainly seems to me that the exception was directly intended to abrogate the rule of English law that a combatant in a fair duel who kills

(1) I. L. R., 5 Calc., 31.
(2) I. L. R., 6 Calc., 154.

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

his opponent is guilty of murder. If so, the rule must equally apply, however numerous the combatants may be, provided they have voluntarily sought the contest with a knowledge that its results may probably be fatal." This view appears to be approved by Mr. Stokes, p. 209, vol. I, Anglo-Indian Codes.

The *Officiating Deputy Legal Remembrancer* (Mr. *Leith*) for the Crown:—The construction to be placed on the words in the exception "takes the risk of death with his own consent," should be consents to take the risk of death ensuing as the result of a definite act to be performed by a definite person, that is, permits, after deliberation, a certain person to do a certain act which may result in death. The moment a person engages in a hazardous enterprise which may involve the loss of his life, he does not take the risk of death with his own consent, within the meaning of exception 5, so as to afford any person an opportunity of destroying him while engaged in such enterprise without being liable for murder. The idea of consent involves the idea of deliberation and a decision arrived at thereafter. To permit a thing to be done is very different from consenting to a thing being done.

The Court (PETHERAM, C.J., PIGOT, O'KINEALY, MACPHERSON and GHOSE, JJ.) delivered the following opinions:—

PIGOT, J.—I am of opinion that the question referred to us should be answered in the negative. I think that, upon the finding cited in the reference, the case does not fall within the 5th exception to section 300 of the Penal Code.

The learned Judges referring the case say:—

"It has been found—and we see no reason to question the findings—that they were all guilty of rioting armed with deadly weapons, and that one of the accused, Nayamuddin, in the course of the riot and in prosecution of the common object of the assembly, killed or attempted to kill a man under such circumstances that his act amounted to an attempt to murder, unless that act bears a less grave character by reason of exception 5 to section 300 of the Penal Code."

And also:—

"In this case it is found, and we accept the finding: 'The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and

pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men on accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one.'"

It is not found as a fact that the deceased did suffer death, or take the risk of death, with his own consent. If the case comes within the 5th exception, it can only do so, because the second finding above mentioned, read in connection with the other, leads by necessary inference to the conclusion that the deceased did within the meaning of the exception consent to suffer death or to take the risk of it, at the hands of any person who might be a member of the hostile party.

I own that as I read the cases of *Shamshere Khan* v. *Empress* (1) and of *Queen* v. *Kukier Mather* (2) there referred to, I think they do decide, that from such a finding as this, such a consent is to be inferred: and I feel bound respectfully to dissent from them if, and so far as, they do so decide.

It is not easy to construe the 5th exception: the wholly anomalous rule which it lays down is expressed but in few words, unaided by definitions: but I think it is not going too far to say that it should receive a strict and not a liberal construction; I mean that it should only be applied to cases which quite clearly fall within it.

I think the exception should be considered in applying it, first, with reference to the act consented to or authorised, and next with reference to the person or persons authorised. And I think that as to each of these, some degree of particularity at least should appear upon the facts proved, before the exception can be said to apply. I cannot read it as referring to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances not merely of time, but of mode of inflicting it, specifically consented to, as for instance in the case of *suttee*, or of duelling, which were, no doubt, chiefly in the minds of the framers of the Code.

Nor can I understand that it contemplates a consent to the acts of persons not known or ascertained at the time of the consent

(1) I. L. R., 6 Calc., 154 (158).

(2) Unreported.

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

being given. I do not doubt, that the consent may be inferred from circumstances and does not absolutely need to be established by actual proof of express consent.

In *Shamshere Khan* v. *Empress* (1) it is said—"A man, who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life: and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk." In such a case the circumstances do show a distinct act of the mind of each combatant with respect to the other and *in concert with him* of willingness to encounter and suffer such known and anticipated acts of violence from that other as he cannot defend himself from. I am not sure that to include such a case within the exception is not rather to strain the terms of it, but I am not prepared to hold that here the exception would not apply.

But I think there is a distinction between such a case and that referred to in the following passage, at page 158 of the report of *Shamshere Khan* v. *Empress*, of the members of two riotous assemblies who "agree to fight together," and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons. I do not think that from such a mere agreement to fight, such a consent as is contemplated by the section can be imputed to each member of each mob, to suffer death or take the risk of death at the hands of any one of the armed members of the other mob, by means of whichever of such deadly weapons, used in whatever way that person may please, and be able, to inflict it.

Whether or not the exception would apply if a fight were so carefully arranged beforehand, that the express consent of the members of each party to take the risk of death in the fight at the hands of the opposite party could be established, need not be here discussed. The present is not such a case, nor was either *Shamshere Khan* v. *Empress* (1) or (2) *Queen* v. *Kukier Mather* such a case.

But I should myself find great difficulty in holding that a general consent to take the risk of the lethal acts of each and all

(1) I. L. R., 6 Calc., 154 (158).
(2) Unreported.

of the members of the opposing mob, could be such a consent as is contemplated by the exception, or that such a case would come within it at all. I confess that, unless compelled by very clear words, I should hesitate to give such a construction to this exception as should involve the proposition that the Legislature intended by it to confer a species of privilege upon the murderous acts of riotous assemblies, provided the members of them should add to their offence the further quality of deliberate premeditation in the commission of it.

PETHERAM, C.J.—I agree with the judgment which has just been read.

MACPHERSON, J.—I entirely agree with the judgment which has just been delivered by Mr. Justice Pigot.

O'KINEALY, J.—In this case the accused, five in number, were convicted of offences under Sections 148, 304, 325, 302 and 149 of the Indian Penal Code by the Officiating Sessions Judge of Furridpur. He held that the fight in connection with which the prisoners have been convicted was premeditated and pre-arranged—a regular pitched battle or trial of strength between the Gujnaipur party and the men on the accused's side—and both sides were armed with spears and *lathies*.

On this statement of facts, the learned Judges who heard the appeal have referred to us the question, whether this finding brings the offence of the appellants within exception 5, section 300 of the Indian Penal Code, and reference has been made to the cases of the *Queen-Empress* v. *Rohimuddin* (1) and *Shamshere Khan* v. *The Empress* (2) as directly in conflict upon the meaning to be attached to that exception.

Assuming that I am in a position to give a judicial decision upon the question now before us, of which I am not at all certain, I am of opinion that the finding of the Court below is not sufficient to bring the case of the prisoners within the exception. The exception states that "culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own

(1) I. L. R., 5 Calc., 31.
(2) I. L. R., 6 Calc., 154.

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

consent." Consent under the Code is not valid if obtained by either misrepresentation or concealment, and implies not only a knowledge of the risk but a judgment in regard to it, a deliberate free act of the mind. In other words, before this section can be applied, it must be found that the person killed, with a full knowledge of the facts, determined to suffer death or take the risk of death, and this determination continued up to, and existed at, the moment of his death. It appears to me difficult to assert that when two parties armed with *lathies* and spears go out to fight, the members of each party consent to suffer death; nor can it, I think, be predicated, as a general rule, that they consent to take the risk of death.

In section 87 of the Indian Penal Code it is stated that "nothing which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm." Appended to this section there is the following illustration:—"A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play; and if A, while playing fairly, hurts Z, A commits no offence."

This section and illustration show what amount of evidence the Legislature considered sufficient to prove that a person injured had "consented to suffer the injury incurred." Applying that illustration to a few cases, I think we may arrive at something like a definite idea of what the Legislature intended by similar words in section 300, exception 5. If two men went out armed with rifles and fired at each other from a distance of 10 yards, and one of them was shot, then looking at the nature of the weapons and the short distance which separated them, I think, looking at the illustration to section 87, that a Jury would be entitled to hold that they took the risk of suffering death. But as the existence of the consent at the moment the deceased received

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

the fatal shot would be necessary in order that the accused should obtain the benefit of the exception, he could not succeed if the evidence pointed the other way. Thus, if the deceased declined to continue the fight, or ran away, or showed in any other open manner a desire to avoid his previous consent, the accused could not successfully appeal to this exception. On the other hand, if they were armed only with ordinary walking sticks, I think it would be extremely difficult for a Jury to hold that the parties had fully before them the idea that they were running any risk of death, or ever consented to suffer death. Between these two extremes there are numerous cases different in degree, in which it would be extremely difficult to state what was the mental attitude of the person whose death was caused when he was killed. If, as I have said before, the parties were armed with guns and were placed near each other, a Jury might well find that they had undertaken the risk of death. If, on the other hand, there was only one or two guns amongst a great number of people, there would be much less room for the conclusion that the deceased considered there was any risk of death or consented to take it. So far as I can see, the nature of the weapons with which the parties were armed in this case is only one out of many facts from which the consent of the deceased should be inferred: and I myself would not come to the conclusion that any individual of either of the two parties consented to take the risk of death, when the evidence in support of that conclusion is simply that some of the men on both sides were armed with *lathies* and spears. No doubt in the case of *Queen* v. *Kukier Mather* (1), White, J., in delivering the judgment of the Court, said: "A man, who by concert with his adversary, goes out armed with a deadly weapon to fight an adversary, who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life, and as he voluntarily puts himself in that position, he must be taken to consent to incur that risk. If this reasoning is correct as regards a pair of combatants fighting by premeditation, it equally applies to the members of two riotous assemblies who agree to fight together, out of whom some on each side are to the knowledge of all the members armed with deadly weapons."

(1) Unreported.

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

I do not understand the Judges in that case to decide that as a matter of law, such consent must be presumed in every case of rioting with deadly weapons, but rather that in that particular case the evidence warranted the conclusion. If I did understand them so to hold, I should be compelled to dissent. To my mind there is no presumption of law at all. The matter, as I think is pointed out by the illustration to section 87, is one of fact to be decided on the evidence given at the trial.

GHOSE, J.—The question we are called upon to decide is whether upon the finding cited in the reference, the case falls within the 5th exception to section 300, Indian Penal Code. That finding is as follows:—

"The third version of the occurrence is that of certain witnesses for the prosecution, and it is to the effect that the fight was premeditated and pre-arranged, a regular pitched battle or trial of strength between the Gujnaipur party and the Laukhola men of accused's side. It cannot, I think, be at all reasonably doubted that this third account of what took place is the true one."

I do not think that these facts are sufficient to show that Summiruddin, who was either killed or wounded, suffered death or took the risk of death with his own consent.

I observe that the Sessions Judge also finds that the rioters on *both* sides were armed with deadly weapons; but it is not found, whether only a few or a large number of the rioters on the side opposed to Summiruddin were armed with such weapons, nor has it been found that the man took a part in the battle with a full knowledge of the risk he was incurring, and that he continued to fight and did not attempt to retire until he was disabled. Upon the facts found, and confining myself to those facts, I am unable to say what was the attitude of Summiruddin's mind at the time when he entered into the conflict, and whether that attitude continued till he received the fatal blow.

I do not think that any general rule of law can be laid down in a case like this; for it is, I take it, a question of fact, and not of law, to be decided upon the circumstances of each case.

There is an obvious distinction between suffering death and taking the risk of death with one's own consent; and that being so, different considerations would in many instances arise, according

as the particular case comes under the first or second head of the 5th exception to section 300.

In the case of a person who is said to have suffered death with his own consent, some definite circumstances both as to time and the mode of inflicting death, consented to—as in the case of a *suttee*—should, no doubt, as has been observed by Pigot, J., be proved. But I am disposed to think that this rule cannot always apply in the same way in the other case.

In the case of a person entering into a duel with another person, both being armed, neither of the combatants specially consents to being killed: each of them hopes to come out victorious, but knows fully well at the same time that he incurs the risk of being killed —so in other cases of the kind, where two persons in concert with each other deliberately fight with deadly weapons.

In such cases, I think, it can hardly be questioned that the exception would apply. If so, I do not see why, when the fight is between a person and two or more persons, or between two or more persons on either side, it cannot apply. There is nothing in the exception itself to indicate such a distinction.

Take this case: Two men, on each side, are determined and agree to fight each other until some one of them is killed or wounded. They use different weapons; the two on one side use a gun and a club, respectively, and the other side a sword and spear. The fight is begun, and nothing is shown indicating that any one of the combatants resiled from that determination and agreement; and in this fight one of them is killed. Here there was no consent given by the deceased to any particular person killing or wounding him, or as to the particular weapon that might be used for the purpose. Instances of this kind might be multiplied to show that a band of persons varying in number, and armed with different kinds of weapons, may fight another band of persons similarly situate, both bands agreeing to fight each other until one is killed. In these cases, the person killing, the person to be killed, the mode and the instrument by which death might be inflicted, would be uncertain; and yet, each one of the combatants might expressly consent to suffer death, or take the risk of death. Can it be said that in these cases the exception does not apply? In a case where there is no *express* consent, the difficulty

1891

QUEEN-EMPRESS v. NAYA-MUDDIN.

of bringing the offence within the exception is indeed great; but there may be facts and circumstances proved, which necessarily lead to an inference of consent, and from which the Jury may find that the deceased took the risk of death with his own consent.

I do not understand that Mr. Justice White in the two cases of *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) meant to lay down any other proposition of law than two: *first*, that the 5th exception to section 300 of the Indian Penal Code should not be taken to be confined to the case where two men by concert fight each other with deadly weapons; but that it may also apply in the case of two bands of men entering into a premeditated fight in concert with each other with deadly weapons: and *second*, that the 5th exception stands upon different grounds from the 4th exception. And so far as these two propositions are concerned, I agree with him. I do not think that the said learned Judge meant to lay down, as he could not lay down, any general rule applicable to all cases of the kind; when in each case, the question must be determined upon evidence whether the deceased took the risk of death with his own consent; and this must necessarily depend upon the particular facts proved. And as I read his judgments, the conclusion that he arrived at was upon the facts proved in each of the two cases before him.

T. A. P.

CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

1891
May 14.

BAGAL CHUNDER MOOKERJEE (ONE OF THE JUDGMENT-DEBTORS, OBJECTOR) *v.* RAMESHUR MUNDUL (DECREE-HOLDER) AND ANOTHER (AUCTION-PURCHASER), AND ANOTHER (JUDGMENT-DEBTOR).*

Sale in execution of decree—Setting aside of sale—Irregularity—Civil Procedure Code (Act XIV of 1882), *ss.* 290, 291—*Appeal—Civil Procedure Code Amendment Act of* 1888.

Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation

* Civil Rule No. 303 of 1891 against the decree of R. F. Rampini, Esq., Judge of Burdwan, dated the 23rd of December 1890, affirming the order of Baboo Kalidhan Chatterjee, Munsiff of Ranigunge, dated the 22nd of February 1890.

(1) I. L. R., 6 Calc., 154. (2) Unreported.