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KATRAS JHERRIAH COAL COMPANY v. SIBKRISHTA DAW & COMPANY.

We set aside the order of the Sub-Divisional Officer of Ranigunge and direct that under the provisions of section 146 of the Code of Criminal Procedure the Sheebpur and Kanthi collieries, together with the tramways, wharfs and buildings appertaining thereto, be attached until a competent Civil Court has determined the rights of the parties thereto or the person entitled to the possession thereof.

Order set aside and fresh order made.

H. T. H.

APPELLATE CRIMINAL.

Before Mr. Justice Beverley and Mr. Justice Banerjee.

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December 21.

JAHIRUDDIN *v.* QUEEN-EMPRESS.*

Unlawful assembly—Common object—Murder—Prosecution of common object—Penal Code, section 149.

Neither of the cases, *Queen* v. *Sabed Ali* (1) and *Hari Singh* v. *The Empress* (2), lays down any hard and fast rule as to the circumstances under which one member of an unlawful assembly can be deemed guilty of an offence committed by another under the provisions of section 149 of the Penal Code, and every case must be decided on its own merits. In dealing with such cases, while on the one hand it is necessary for the protection of the accused that he should not, merely by reason of his association with others as members of an unlawful assembly, be held criminally liable for offences committed by his associates, which he himself neither intended, nor knew to be likely to be committed, on the other hand it is equally necessary for the protection of the peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offender with one common object. Those two cases respectively emphasize the necessity of keeping these considerations in view. Members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent

* Criminal Appeal No. 786 of 1894 against the order passed by R. H. Anderson, Esq., Additional Sessions Judge of Backergunge, dated the 27th August 1894.

(1) 1 B. L. R., F. B., 347 : 20 W. R. Cr., 5. (2) 3 C. L. R., 49.

to which he shares the community of object, and as a consequence of this the effect of section 149 may be different on different members of the same unlawful assembly.

THE accused in this case was charged with murder under section 302 of the Penal Code read with section 149, and also with an offence under section 436.

The charges were made in respect of a riot which had taken place some time before, and in respect of which certain other persons had been previously tried and convicted, the present accused not being then tried as he had absconded. He was tried before the Sessions Judge and two Assessors, one of whom considered he ought to be acquitted, while the other was of opinion that he was guilty.

The Sessions Judge convicted him and sentenced him to transportation for life. His judgment, which fully states the facts and the evidence in the case, was as follows :—

"This is a supplementary case and the essential facts may be stated as follows :—

"Complainant Samaruddin and others, took a settlement of some *beel* land covered with jungle in the village of Kaikhalli Pubrampur, about three years ago from Jagabandhu Sikdar and others. The lease was granted in Phalgoon, and in the Aswin following the lessees made a *basha* or temporary residence on part of the land and proceeded to clear the land round it. It appears that the Sikdars were the last in a series of tenure-holders, and the *maliks* denied the title of one of the under tenure-holders and gave a lease of the same land to certain persons, amongst whom it is said the present accused was—at any rate he gave out that he was one of the lessees. These new lessees then advised the complainant and his co-sharers to leave, but were not heeded. It is said that accused himself used to threaten the earlier lessees. He had a *basha* and some land a little to the south of complainant's *basha*. However, nothing of much consequence happened until noon on the 7th Jashti (*i.e.* 20th May 1893). The complainant and six others, namely, Safiruddin, Asman and Maddi, Armanullah, Nazamuddin, and Maizuddin had finished or were at their mid-day meal in the *basha*, which I should say consisted of two sheds with a *hatina* or verandah, when they heard shouts, and some of them going outside it was seen that a body of forty or fifty men was coming armed, six of them with guns and the others with spears and *lathis*. They had come to the ditch on the south of the *basha*, and told complainant's party to go. The latter refused. There was some abuse on both sides, and then the six men with guns fired. Safiruddin dropped dead, Asman went to the border of the *basha* and fell, and the others of complainant's party ran away, some north and

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some east into the jungle. Of these the complainant Nazamuddin and Maddi had also been shot. Then accused who had been seen amongst the attacking men with what the witnesses think was a spear came with two other men and set fire to the *basha*, while the rest of the mob, hearing a man had been killed, ran off. Having set fire to the *basha* accused and his companions dragged Safiruddin's body to one of the boats which belonged to the *basha* and proceeded along the *khal* which borders the *basha* on the south. They were lost to sight when they entered the jungle, but as it was afterwards discovered left the boat and body not very far off. Then a little afterwards complainant's party began to return or be brought to the *basha*. Word was sent to the police who were not far off. The Sub-Inspector came and recovered Safiruddin's body and sent it in for examination and sent the wounded men to Ferozepur for treatment. Asman died on the way. The others who were not so seriously injured recovered, but Maddi to this day cannot use his leg properly and Nazamuddin's hand is crooked. Seven persons were sent up for trial. Three were sentenced to be hanged, and three were sentenced to transportation for life. One was acquitted. The High Court on appeal confirmed the sentence of death passed on two of the men and commuted that on the third, who was young, to transportation for life. These three men had guns. The present accused absconded. There is ample evidence of this in the present record. As to the facts generally I need say nothing. I think the evidence is too strong to admit of the very slightest doubt that the occurrence was as I have above described. The only questions are whether this accused was one of the attacking party, was armed with a spear, set fire to the *basha* and helped to remove Safiruddin's corpse. The complainant and the other four survivors of the party who were in the *basha* at the time have been examined. They all declared that they saw the accused with what they think was a spear, and complainant and two others further swear that they watched the proceedings from the edge of the jungle where they had taken refuge and saw accused help to set fire to the *basha* and remove Safiruddin's corpse. The two others of complainant's party say they fainted on reaching the jungle. Besides this, there is the evidence to the same effect of Jagabandhu Sikdar and Sreenath Sikdar, whose *basha* lay a little to the east of the complainant's *basha* and of two under-tenants of the complainant and his co-sharers by name Samiruddin and Nasaruddin, whose *basha* lay to the west of complainant's *basha* near the *khal* and past whose *basha* the boat was taken with the corpse in it. Now, though I am not altogether satisfied with the evidence of the two Hindus, I am quite convinced that the other witnesses have told the truth. The accused was well known to these persons. He had had his cultivations and *basha* not far off the complainant's *basha* for years, and there was a long altercation before the guns were fired, so that there was ample opportunity of observing who the principal men of the attacking party were. Accused was named in the complainant's first information, and the story then told is substantially the same as that now told,

and several of the witnesses distinctly named this accused in previous examinations. The defence is that accused had one Naderali who is connected with the complainant and some of his co-sharers (they are really all in some way connected with each other) imprisoned some time before the occurrence, that accused gave up his land in that locality some years before, and that as a matter of fact he was miles away celebrating a feast on account of his sister's marriage at the time of the occurrence. There have been many witnesses called to prove the *alibi*. I have nothing to say of their evidence except that it is absolutely worthless from beginning to end. It is true that accused did prosecute Naderali and have him imprisoned, but that was some years before the occurrence, and it turns out that Naderali's brother is one of the accused in this case. If accused had really given up his land and gone away some years before, it is in the highest degree impossible that complainant who had been badly wounded would have thought of this man as soon as the Sub-Inspector arrived, which was soon after the occurrence. As to accused giving up his lands he has produced some documents, which, though hardly proved, go to show that he did sell the land, but at the same time took an agreement that it was to be reconveyed to him if he paid the money within a certain time, which time had not nearly elapsed when the occurrence took place. The *kabala* is not produced, only the *ikrar* is. In fact, there is nothing to show he gave up possession of the land or that he did not take a sub-lease from his vendors, while the complainant and his witnesses positively state that he was living there in his *basha* and cultivating the adjoining land down to the date of the occurrence, immediately after which he disappeared. I have said before he is stated to have claimed to be one of the lessees of the land already leased to the complainant and his co-sharers. There is no doubt whatever that accused was living in that locality and cultivating land there at the time of the occurrence. Whatever transactions there may have been regarding the land he originally held, the first Assessor thinks that accused's residence being doubtful renders his identification doubtful. I altogether fail to understand this. He was a known man, though he came from another and distant village, and the witnesses did not know where his original *bari* was. The police only say what they learnt. The accused's own documents describe him as of Haligakati, which is where the complainant and his witnesses say they heard he came from, and in the first information he is said to be *at present* of Pubrampur, and his father's name was not known. Accused now says his *bari* is in Gubabari, that is adjacent to Haligakati, but on his own witnesses' showing he has not been living there since the occurrence but somewhere in the south at a place called Dhansagar. The fact is the man is a wanderer, who lives in various places according to circumstances. As to what the *panchyat* says about not knowing the accused, and as to accused's *basha* not being in his list in accused's name, that may well be. It is an out-of-the-way place in a *beel*. It is doubtful from the evidence if it is in the *panchyat elaka*, and it may be in some one else's name. The list

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was not produced to test this matter, and indeed it is not of the slightest consequence. The chowkidar knew the accused and his *basha* well enough. Accused's brother, I should perhaps note, is said to have been living in that *basha* and cultivating with him. How accused lives may be surmised from the head constable's evidence regarding his capture. He was making his way south in a boat at dead of night, was armed with a most formidable knife, a blade I should say nearly 2 feet long and a *lathi*, and had concealed himself under a *juntra* (rain shield) at the bottom of the boat. I have no doubt the head constable has told nothing but the truth regarding the capture.

"The witnesses have been cross-examined at great length but are not shaken. Much is attempted to be made of the plantain trees and castor plants on the sides of the *basha* as though they were dense jungle which would prevent men being identified. But the evidence shows they are sparse plants, as indeed we should expect round a new *basha*. Witnesses might even confuse the present condition of the plants with that of over a year ago, and make them denser than they really were then, but after all there is no doubt on the evidence recorded that the plants were thin and scattered. The Sub-Inspector noted this at the time.

"The *nal* (reed) jungle too was sparse in places and dense in others and not of the same height everywhere, so that there is no reason for doubting that the witnesses could have seen what was going on in the *basha*.

"In fine there is not a shadow of doubt that the witnesses, or most of them, if we omit the two Hindus, could identify the accused, and I am quite satisfied they did identify him. He was, as I said before, named at once, and the part he played in removing the corpse of Safiuddin at any rate was mentioned. That was in his absence. It is to be further remarked that up to the setting fire to the house the witnesses candidly admit accused did nothing in particular. I do not doubt he had a spear as they say. For these reasons I believe the evidence adduced by the prosecution and find accused Jahiruddin guilty of offences punishable by section 302 with section 149 of the Penal Code and section 436 of the Penal Code, and direct that he be transported for life."

Against this conviction and sentence the accused appealed to the High Court.

Babu *Dwarka Nath Chakravarti* for the appellant.

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

The judgment of the High Court (BEVERLEY and BANERJEE, JJ.) was as follows:—

The appellant has been convicted by the Sessions Judge of Backergunge under section 302, read with section 149, and under section 436 of the Indian Penal Code, of the offence of murder,

which was committed by some members of an unlawful assembly of which he was a member, in prosecution of the common object of that assembly, and of the offence of causing mischief by fire to a human dwelling, and he has been sentenced to transportation for life.

In appeal it is contended before us, *first*, that the evidence is insufficient to warrant the finding that the accused was present at the riot; *secondly*, that, even if it be found that the accused was present at the riot, the evidence is insufficient to warrant his conviction for murder, the requirements of section 149 of the Indian Penal Code not being shown to have been fulfilled; and, *thirdly*, that the evidence is insufficient to warrant the conviction under section 436 of the Indian Penal Code.

With reference to the first and the third contention it is enough to say that we have considered the evidence and the comments upon it by the learned vakil for the appellant, but we see no reason to think that it is either insufficient or unreliable. We think it is sufficient to warrant the finding that the accused was present at the riot, and after the firing of the guns, when the rioters began to disperse, on hearing that a man had been killed, he, along with certain other members of the unlawful assembly, removed the dead body of Safiruddin and set fire to the huts of the attacked party.

In support of the second contention the learned vakil for the appellant relies strongly on the finding of the Court below that, up to the setting fire to the house, the accused did nothing in particular, and upon the authority of the decision in the case of the *Queen* v. *Sabed Ali* (1), urges that the conviction under sections 302 and 149 should be set aside. On the other hand, Mr. Kilby for the Crown contends that, considering the facts that the accused was one of a body of rioters of whom six were armed with loaded guns and fired them in a volley, that he was himself armed with a spear, and that after the murder he removed the dead body of Safiruddin, the conviction for murder should be held to be right, and he relies upon the case of *Hari Singh* v. *The Empress* (2).

(1) 11 B. L. R., F. B., 347 : 20 W. R., Cr., 5. (2) 3 C. L. R., 49.

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We do not think that either of the two cases cited lays down any hard and fast rule applicable to all cases. The only general principle laid down by the majority of the Full Bench in *Sabed Ali's* case is that, in order to bring a case under the first part of section 149 of the Indian Penal Code, the offence, which is there spoken of as committed in prosecution of the common object of the unlawful assembly, must be one which is committed with a view to accomplish the common object. But each of the two cases was decided with reference to its own facts, and every case depending upon the application of section 149 of the Indian Penal Code must be so decided.

In dealing with such cases, while, on the one hand, it is necessary for the protection of accused persons that they should not, merely by reason of their association with others as members of an unlawful assembly, be held criminally liable for offences committed by their associates, which they themselves neither intended, nor knew to be likely to be committed, on the other hand, it is equally necessary for the protection of peace that members of an unlawful assembly should not lightly be let off from suffering the penalties for offences for which, though committed by others, the law has made them punishable by reason of their association with the actual offenders with one common object. The cases of *Sabed Ali* and *Hari Singh* cited above, respectively, emphasize the necessity of keeping in view the one and the other of these two conflicting, but equally necessary, considerations. We may add that members of an unlawful assembly may have a community of object only up to a certain point, beyond which they may differ in their objects, and that the knowledge possessed by each member of what is likely to be committed in prosecution of their common object, will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object; and, as a consequence of this, the effect of section 149 of the Indian Penal Code may be different on different members of the same unlawful assembly.

Having these considerations in view, and having carefully gone through the evidence, we think the appellant has been rightly convicted under section 302, read with section 149 of the Indian Penal Code. He had an interest in the subject-matter of the dispute;

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he had, previous to the occurrence, used threats to the persons in possession. On the scene of the occurrence he was present armed with a spear, and was among those who were carrying the guns and who fired the fatal shots; and after the murder was committed, instead of leaving the place at once, he busied himself in removing the dead body of Safiruddin and in setting fire to the huts of his adversaries. These facts, in our opinion, clearly show that the conditions, required by section 149 to be fulfilled in order to make one member of an unlawful assembly guilty of an offence committed by any of his associates, have been satisfied in this case. They fully warrant the conclusion that the murder that took place was committed in prosecution of the common object of the unlawful assembly, of which the appellant was a member, namely, the turning out of the opposite party from the huts in question at any risk, in which common object he fully shared, and, further, that he knew it to be likely that murder would be committed in prosecution of that common object.

We must, therefore, affirm the conviction and sentence and dismiss the appeal.

H. T. H. *Appeal dismissed.*

Before Mr. Justice Banerjee and Mr. Justice Sale.

LOLIT MOHAN SARKAR (APPELLANT) *v.* THE QUEEN-EMPRESS (RESPONDENT).*

1894
Nov. 2.

Criminal Breach of Trust—Penal Code, sections 403, 463, 464, 467 and 471—Criminal breach of trust by a servant—Forgery—"Dishonestly"—"Fraudulently"—Fabrication of a document to conceal a contemporaneous or past embezzlement.

An accused person who was in the service of zemindars, and whose duty it was to pay into the Collectorate Government revenue due in respect of their estates immediately before the due date of a *kist*, received from them a certain sum of money with no specific instructions as to its application. On receipt of that money he paid a portion only of it into the Collectorate on account of the revenue, and having done so he then altered the *challan* given back to him showing the amount actually paid, and made it appear that a much larger amount had been paid in than was the fact. This *challan* he sent to

* Criminal Appeal No. 597 of 1894 against the order passed by R. R. Pope, Esq., Officiating Sessions Judge of Jessore, dated the 8th of August 1894.