APPELLATE CRIMINAL.

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

1894 *Sept.* 19.

SABIR AND ANOTHER (APPELLANTS) *v.* QUEEN-EMPRESS (RESPONDENT.)*

Rioting—Rioting armed with a deadly weapon—Common object of unlawful assembly, Statement of, in charge—Penal Code, sections 147, 148, 149 and 304—Error in charge misleading accused—Criminal Procedure Code (1882), section 225.

Before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly, and also that the common object so found should have been stated in the charge in order that the accused person might have an opportunity of meeting it.

Where a Sessions Judge in his charge to the jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge sheet:

Held, that, inasmuch as it was impossible to say which of the two common objects had been accepted by the jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting, the conviction must be set aside.

If one member of an unlawful assembly is armed with a deadly weapon, the other members cannot on that account be charged under section 148 of the Penal Code. It is only the actual person so armed who can be charged under that section.

THE appellants in this case were convicted, upon the unanimous verdict of a jury, of the following offences, *viz.*, (1) Sabir, with culpable homicide not amounting to murder committed in prosecution of the common object of an unlawful assembly, of which he was a member, by causing the death of one Nidu, with the knowledge that he was likely by his act to cause death, but without any intention of doing so, under section 304 of the Penal Code; (2) Esaf, with being a member of an unlawful assembly in the prosecution of the common object, of which one of its members, Sabir, committed culpable homicide, under

* Criminal Appeal No. 527 of 1894 against the order passed by S. J. Douglas, Esq., Officiating Sessions Judge of Dacca, dated the 26th of July, 1894.

1894

SABIR v. QUEEN-EMPRESS.

section 149, taken with section 304 of the Penal Code; and (3) both Sabir and Esaf, with rioting armed with deadly weapons under section 148 of the Penal Code. Sabir was sentenced under section 304 to rigorous imprisonment for seven years, and Esaf under sections 149 and 304 to rigorous imprisonment for three years, and a fine of Rs. 50, or in default to a further term of six months. No additional sentence was passed on them for the offences under section 148. From these convictions and sentences the prisoners appealed to the High Court on the ground that the Sessions Judge had misdirected the jury on a variety of matters, the only ones however which are material being as follows, *viz.*, (*a*) that he had directed the jury that Esaf was guilty under section 148 of the Penal Code of being armed with a deadly weapon, because Sabir had been so armed, and although he, Esaf, had not himself actually had such a weapon in his hand; and (*b*) that he had directed them as to a common object of the unlawful assembly which was entirely different from the one set out in the charge upon which the prisoners had been committed to take their trial.

The facts elicited in evidence taken at the trial were, briefly, that Esaf, accompanied by Sabir and a number of other persons, of whom a few were little boys, were engaged in plucking mangos in an orchard in which Esaf claimed to exercise this right; that Nidu, the deceased, came and remonstrated on behalf of his master, Kunja Behari Poddar, whereupon Koilas Pal, alleged to be on inimical terms with Kunja Behari Poddar, and being also present in the orchard at the time, or possibly some other person—the Sessions Judge, considering it immaterial to decide who—called out "bring me the *sala's* head;" and that thereupon Sabir struck Nidu over the head with a *lathi*, in consequence of which he died.

The charges upon which the prisoners were committed to take their trial at the Sessions were as follows:—

In the case of Sabir—

"*First.*—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) were guilty of the offence of rioting armed with a *lathi, i.e.*, a deadly weapon, and thereby committed an

1894

SABIR v. QUEEN-EMPRESS.

offence punishable under section 148 of the Indian Penal Code, and within the cognizance of the Court of Session."

"*Secondly.*—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) in the course of that riot committed culpable homicide not amounting to murder by causing the death of one Nidu by striking him on the head with a *lathi* and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session."

In the case of Esaf—

"*First.*—That you on or about the 3rd day of May 1894 at Panam (Bojh Moche) were guilty of the offence of rioting armed with deadly weapons and thereby committed an offence punishable under sections 148 and 149 of the Indian Penal Code and within the cognizance of the Court of Session."

"*Secondly.*—That you on or about the 3rd day of May at Panam (Bojh Moche) joined that unlawful assembly, knowing that it was likely that force would be used, and in which force was used, and the death of one Nidu caused by a blow of a *lathi* on his head in taking away mangoes from a garden in charge of Nidu, and thereby committed an offence punishable under sections 304 and 149 of the Indian Penal Code and within the cognizance of the Court of Session."

The portion of the Sessions Judge's charge to the jury material for the purpose of this report, and to which exception was principally taken by the appellants, was as follows :—

"The two accused are charged with having committed a riot on 3rd May last at Panam armed with deadly weapons.

"You must clearly understand what this means. The first element of a riot is an unlawful assembly, which takes place when five or more persons congregate for the common purpose of doing something which is forbidden by law, such as mischief, criminal trespass, or any offence like beating or assaulting any person. The next stage is when any member of such unlawful assembly uses force or violence in prosecution of the common object of such assembly, in which case every member of such assembly is guilty of rioting (section 146 of the Penal Code). The third stage, which forms the subject of the charge against the accused, is arrived at when any member of such unlawful assembly is guilty of rioting being armed with a deadly weapon, then by analogy of

section 146 of the Penal Code every member of such assembly is guilty of the offence of rioting armed with a deadly weapon. And when a man commits a riot armed with a *lathi*, and such *lathi* is used with violence on the human head, I don't think it requires any explanation from me to show that such *lathi* is a deadly weapon.

"It will be, therefore, necessary in the present case for you to find whether or not Sabir and Esaf were members of an unlawful assembly, in the common object of which one or more of their number used violence, being then armed with a dangerous *lathi*, so as to answer the requirements of section 148 of the Penal Code.

"Sabir accused is also charged with having committed culpable homicide not amounting to murder by causing the death of Nidu during such riot under section 304 of the Penal Code. That section is divided into two parts: the first part refers to an act which is done with the knowledge and intention of causing death, but which is not murder, owing to certain extenuating circumstances set forth in the exceptions to section 300 of the Penal Code. The second part refers to an act which is done more or less recklessly with the knowledge that it may result in death, but without any intention of causing death. You must bear the difference in mind.

"Esaf is charged under sections 149 and 304 of the Penal Code to the effect that he was a member of an unlawful assembly, in the prosecution of the common object of which one of the members, Sabir, caused the death of Nidu, in consequence of which Esaf, under section 149 of the Penal Code, is guilty of such culpable homicide.

"Accordingly with regard to Sabir you must be satisfied that he caused such bodily injury to Nidu as caused his death; if you find that such act was done without the intention of causing Nidu's death, though Sabir may have known it was likely to cause his death, you will find that the latter part of section 304 of the Penal Code applies.

"As for Esaf, in order to find him guilty as charged under section 149 and section 304 of the Penal Code, you must be satisfied that the act which caused the death of Nidu was done really with a view to accomplish the common object of the unlawful assembly, of which Esaf was then a member, or that such act was one which Esaf knew, or had reason to believe, would probably be committed in prosecution of the common object of such assembly."

The Sessions Judge then proceeded to deal with the evidence, and then continued:—

"It is for you to say whether or not you believe the main features of the story for the prosecution so as to find the charges against the two accused substantiated.

"If you find that Kunjo Babu was in possession of this orchard, and if you find that these two accused with others, amounting to five or more in

1894

SABIR v. QUEEN-EMPRESS.

number, went to this orchard to gather the mango fruit there and to enforce a supposed right to such fruit by Esaf, you can conclude that in so doing these two accused, and the others with them, were then members of an unlawful assembly, because you can safely consider such act on their part to be calculated to cause wrongful loss and annoyance to Kunjo Babu and to be criminal trespass. The next question is, was any force used by any member of such assembly in furtherance of their common object, *i.e.*, in taking away the mangoes? This depends how far you believe the evidence for the prosecution, which is to the effect that when Nidu protested some one called out to bring his head to him, whereupon Esaf, Sabir, and the others surrounded Nidu and Bakhar, and Sabir struck Nidu with his *lathi* on his head with such force as to fracture his skull and so cause his death. If you accept this evidence and find that Sabir then struck Nidu on the head with his *lathi*, you will also find Sabir and Esaf guilty, as charged, of the offence of rioting with a deadly weapon.

"On the next charge, you must be satisfied that Sabir struck Nidu this blow which killed him, and that it was struck in furtherance of the common object of the assembly then, and that Esaf knew that in accordance with the general object such blow would probably be delivered. This again depends on whether or not you believe the evidence that this blow was struck by Sabir. With regard to Esaf, it is not denied that he was present on this occasion, but it is urged that he is in no way responsible for what happened to Nidu. What was then the general object of this assembly? If you believe the evidence, it was to carry out the order and to bring Nidu's head because he prevented Esaf and the others from taking these mangoes, the purpose for which they had assembled, and the blow was struck accordingly. Did Esaf know that this blow would be then struck? This is for you to decide. The evidence shows that he with Sabir and the others ran up to where Nidu and Bakhar were standing, and, though he had no stick in his hand himself, he was there with the others when Sabir struck Nidu in accordance with the order to bring 'the *sala's* head.' I think you can conclude that Sabir struck Nidu in prosecution of such common object then, and that Esaf must have known that Sabir would do so.

"The evidence in support of such charges appears to me to be satisfactory, and it seems to me that the prosecution has substantiated the case against these two men, but it is for you to decide.

"If you have any reason to doubt or disbelieve this evidence you will at once acquit these two men on all charges."

Mr. *Pugh*, Mr. *Donogh*, and Babu *Harendra Nath Mittra* for the appellants.

Mr. *M. Ghose* for the Crown.

For the appellants it was contended that the alleged common object of the unlawful assembly should have been clearly set out

in the charges, and the case of *Behari Mahton* v. *Queen-Empress* (1) was relied on; that the jury must have been misled by the Judge's propounding two different common objects, one of which at least the prisoners could not have been apprised of until the very end of the Judge's summing up; and that they must necessarily have been thereby prejudiced in their defence; and further that the conviction of a person under section 148 of the Penal Code, because another member of the assembly had been guilty of rioting with a deadly weapon, was clearly unsustainable.

For the Crown it was argued that, although the conviction under section 148 of the Penal Code could not be supported, the convictions on the other charges should not be set aside; that, although the charges had not been artistically drawn, a common object could be made out from the second charge against Esaf; and that at any rate section 225 of the Criminal Procedure Code would cure the defect if there was one.

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

In this case two persons have been convicted by a Judge and jury, and, of course, in accordance with the law, it is necessary for us to find a defect in the charge, or in some other portion of the procedure, before we can interfere with the conviction. On the question of sentence, however, that is in our hands.

The occurrence which led to this charge was a dispute about the possession of an orchard. It was claimed by Esaf, who is one of the appellants before us. The case of the prosecution is that the two appellants, with others, went to this orchard for the purpose of gathering the fruit of some mango trees growing there, and an altercation arose between them, and a man named Nidu, who was acting on behalf of the rival claimants to this orchard. In the end it is said that the accused Sabir struck Nidu on the head with a *lathi*, and that two days afterwards Nidu died. Sabir has been convicted under section 304 of the Indian Penal Code of causing the death of Nidu, and there is no matter in the charge affecting his conviction under this section which can be

(1) I. L. R., 11 Calc., 106.

1894

SABIR v. QUEEN-EMPRESS.

impugned. The only question, so far as he is concerned, is the question of punishment. He has been sentenced to seven years rigorous imprisonment. That, of course, is a very heavy punishment. There is in his favour the circumstance that there was no premeditation before this attack was made. It was, apparently, the result of momentary excitement, and there was, so far as we know, only one blow struck. On the other hand, in the case of attacks or assaults where a blow so severe as to cause a man's death is given, and where weapons, which are in efficient hands unquestionably *lethal*, are used, it is impossible to inflict a light punishment. We do not think we would be erring if we were to reduce the sentence on Sabir to three years' rigorous imprisonment. We do not think we can reduce it to anything less, and accordingly we direct that the conviction be upheld and the sentence reduced to three years' rigorous imprisonment.

The case with regard to Esaf stands upon an entirely different footing. He has been convicted under section 148 and section 304, read with section 149, of the Penal Code. It is not disputed that there is no case against him under section 148 of the Penal Code. That section says : " Whoever is guilty of rioting being armed with a deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, shall be punished," &c., and so on. The learned Sessions Judge is under the impression, acting upon what he calls the analogy of section 146 of the Code, that if one member of an unlawful assembly is armed with a deadly weapon, or a weapon of offence, the other members of the assembly can be charged under section 148. That is not so. It is only the actual persons who are so armed who can be charged under that section. The only way in which one person can be made liable for the acts of another is under section 149. There being no case under section 148, we think that the conviction is wrong under the latter section and must be set aside.

There is also, we think, no case under section 149, read with section 304. It was not really argued that the members of this assembly knew it to be likely that homicide would be committed in prosecution of the object of that assembly. With regard to the common object charged, as to which we shall refer presently,

that is to say, the taking away the mangoes from the trees, the learned Judge has, we think, in his charge, extended the phraseology of section 149 too far, and having regard to the part which Esaf is proved to have taken, assuming the evidence to be true, in this matter, we think it would be straining the law to apply to it the provisions of section 149 and make him liable for the death of this unfortunate man Nidu.

Now comes the real question in the case, and it is the only question which has presented any difficulty to us. Although Esaf may not be properly convicted either under section 148 or section 149 of the Penal Code, still it is competent to the Court to convict him under another section, which is one of the component parts of section 148, namely, section 147. As there was a conviction under sections 148 and 149, it was unnecessary for the Judge to take the verdict of the jury under section 147, but if there had been an acquittal under those sections, the Judge would have been bound to take their opinion as to whether Esaf was guilty of rioting, and, therefore, guilty under section 147. It follows that, before we can acquit him altogether, we are bound to see whether he is entitled to an acquittal under that section also.

The objection made on his behalf to his being convicted under that section arises from the allegation of the prosecution, and the charge made, and the charge of the Judge, with reference to what is stated to be the common object of the assembly. In the charge upon which he was tried there is, apparently, a reference made to the common object of this assembly being to take the mangoes. It is pointed out by the learned Counsel that, though it is not drawn very artistically, that is what the charge means, and practically says. The learned Judge, in his charge to the jury, with reference to this question, after going into other matters, to which it is not necessary here to refer, says this: "If you find that Kunjo Babu, that is the rival claimant, was in possession of the orchard, and if you find that these two accused with others, amounting to five or more in number, went to this orchard to gather the mango fruit there, and to enforce a supposed right to such fruit by Esaf, you can conclude that in so doing these two accused, and the others with him, were then

1894

SABIR v. QUEEN-EMPRESS.

members of an unlawful assembly, because you can safely consider such act on their part to be calculated to cause wrongful loss, and annoyance to Kunjo Babu and to be criminal trespass." That so far is perfectly right, and in accordance with the charge. The Judge goes on to say : " The next question is, was any force used by any member of such assembly in furtherance of that common object, *i.e.*, in taking away the mangoes ? This depends upon how far you believe the evidence for the prosecution, which is to the effect that when Nidu protested, some one called out to bring his head to him, whereupon Esaf, Sabir, and the others surrounded Nidu and Bakhar, and Sabir struck Nidu with his *lathi* on his head with such force as to fracture his skull and so cause his death. If you accept this evidence and find that Sabir then struck Nidu on the head with his *lathi*, you will also find Sabir and Esaf guilty, as charged, of the offence of rioting with a deadly weapon."

Then he goes on : " On the next charge you must be satisfied that Sabir struck Nidu this blow which killed him, and that it was struck in furtherance of the common object of the assembly then, and that Esaf knew that in accordance with the general object such blow would probably be delivered. This again depends on whether or not you believe the evidence that this blow was struck by Sabir. With regard to Esaf, it is not denied that he was present on the occasion, but it is urged that he is in no way responsible for what happened to Nidu. What was then the general object of this assembly ?" He then goes on, and this is an important part of his charge : " If you believe the evidence, it was to carry out the order to bring Nidu's head, because he prevented Esaf and the others from taking those mangoes, the purpose for which they had assembled." So we have here the Judge directing the jury that the general object of the assembly was to carry out the order to bring Nidu's head, the general object at that particular time. At first the general object was to take the mangoes, but as the proceedings developed, the object changed to one to injure Nidu, for, of course, the words do not really mean to bring his head, but to injure him.

Now, the jury having convicted under sections 148 and 149, before we can say that there ought to be a conviction under section 147, we must be satisfied that the jury have found an

unlawful common object. It is impossible for us to say, on the findings, whether they have given their verdict upon the unlawfulness of the common object to injure Nidu, or the unlawfulness of the common object to take the mangoes. It may well be, and, in dealing with these matters one is bound to consider the matter most favourably to the accused, that they preferred to accept the view that the common object was to injure Nidu, inasmuch as it did away with the necessity of coming to any conclusion on the question of the possession of the orchard. If they found that the common object of the assembly was to injure Nidu, that would be enough, and they need not find the other. But there is no charge whatever on this head ; an entirely different common object has been charged.

Our attention has been called to section 225 of the Code of Criminal Procedure, which provides that "no error in stating the particulars required to be stated in the charge, and no omission to state those particulars, shall be regarded at any stage of the case as material unless the accused was misled by such error or omission." In a case of this kind there may be evidence of a variety of common objects, but here, so far as we can see, it is impossible for us, on the evidence as it stands and having the charge there is at present, to say that the jury accepted either one or the other of those common objects. They accepted one, it is true, but which one they accepted it is impossible for us to say. It may make a difference in the case if, as a matter of fact, they accepted the case that the common object was to injure Nidu. But that was a common object that was never charged at all, and the accused person had no opportunity of meeting it. Of course, the finding of the jury with regard to the common object may have very great effect upon the seriousness of the crime and, therefore, on the punishment.

In the result, we think we are bound to set aside the conviction of Esaf, but we think that this case is not one which we can deal with ourselves, and we accordingly direct that it be retried under a properly framed charge under section 147 of the Penal Code, and that, until the trial, the accused Esaf be released on bail to the satisfaction of the Magistrate.

H. T. H. *Appeal allowed in part.*