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any such re-adjustment of rent can be made, that he, as well as his co-sharer, should sign the notice and apply to have it served upon the tenant. So again, in any fresh adjustment of the rent by which he desires to raise his quota of rent to the level of that of his co-sharer, such co-sharer must, I conceive, join with him in the notice to be served on the tenant. No doubt, a new and separate tenancy is created by the new contract of lease, but from the very nature of the case the contracting parties continue the same, and the tenure remains as before, a joint undivided property. In this view the suit of the plaintiff must fail, because the notice of enhancement required by law has not been served on the tenant on the application of all the persons to whom the rent is payable. The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Field.

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SAMSHERE KHAN AND OTHERS *v.* THE EMPRESS.*

Riot — Unlawful Assembly — Culpable Homicide — Fight between two contending Factions, each armed with Deadly Weapons—Penal Code (Act XLV of 1860), s. 300, excep. 5.

Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.

THE facts of this case sufficiently appear from the judgments.

Mr. *Wood* and Mr. *Bonnerjee* (with them Baboo *Nulit Chunder Sein*, Baboo *Jogesh Chunder Roy*, and Munshee *Sirajul Islam*) for the appellants.

Baboo *Doorga Mohun Das* for the Crown.

* Criminal Appeal, No. 408 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 21st April 1880.

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The following judgments were delivered :

WHITE, J.—This is an appeal against the conviction of the five appellants, named Samshere Khan, *alias* Sirdar, Abdul Rohoman Moonshee, Saheb Khan, Uasimuddi Meah, and Fakiroollah Khan, for murder committed in the course of a riot, for which offence they have been severally transported for life.

The evidence extends to a very great, and in my opinion a very unnecessary, length. It is full of repetitions, and yet the inquiry in some important respects has not been as searching as it might have been. It is clear, however, that a very serious riot took place in a village called Latshailla on the morning of the 17th January of this year, which resulted in the wounding of one man and the death of another. Two of the shareholders of a portion of a share in the village, named Kurreem Sirdar and Dost Mahomed, having quarrelled about their share, sold each of them a fraction of his share to two rival zemindars, Khan Saheb and Dwarkanath Roy, with the object of enlisting two powerful neighbours in the dispute. The purchase by Khan Saheb was taken in the name of his son Hafiz. It would appear that Kurreem Sirdar, when he sold, was not in possession of his share, and that Khan Saheb, shortly before the riot took place, had been taking steps to get possession of the fractional part which he had bought, and for that purpose had erected a cutcherry on the land of the prisoner Fakiroollah, who is described as a small talukdar in the village, and who had become a partisan of Khan Saheb. This step was followed very soon afterwards by the introduction of some lathials into Fakiroollah's bari. On the morning of the 17th of January, Dost Mahomed also collected a number of persons in his homestead. As to the origin of the riot, which took place on that morning between the two partisans, we think that the most reliable evidence is that of Nobi Bux, the constable, who had, some days previously, been deputed by the authorities to keep peace in the village, and who was on the spot whilst the riot was going on. From his evidence it appears, that Dost Mahomed and some of his party came down that morning to Fakiroollah's bari; that the constable, then seeing preparations being made on both sides, which led him to believe that a breach of the peace was imminent,

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had a report drawn up, which he forwarded to the thannah, with a request that the Inspector of Police would attend, but before the Inspector could arrive, the two factions, with armed men on both sides, met in conflict in a field of Dhanoo Sircar, just outside the borders of Fakiroollah's bari. After a short fight, Gariboolla, who was one of Dost Mahomed's party, was wounded in the stomach with a spear. Upon this Dost Mahomed's party fled eastward to a jack tree, about fifty yards off, pursued by Khan Saheb's party; that there Dost Mohomed's party were reinforced by some more partisans armed with spear and latties, when Khan Saheb's party, in their turn, took to flight, but having fled about eighty yards, were rallied near some mangoe trees. The fight then recommenced, and very soon afterwards a man named Khoaz, who also belonged to Dost Mahomed's party, was killed. A great deal of argument has been addressed to us to show that Khan Saheb's party was a lawful assembly collected together for the defence of the cutcherry, which had been erected on Fakiroollah's land. It may be that there was a motive of defence in collecting the party in the first instance, but judging them from their acts and conduct, and from what subsequently took place, we think there can be no reasonable doubt that they were originally assembled for purposes of offence as well as defence; that the purpose was, by means of criminal force, to enable Khan Saheb to assert his right, or supposed right, of collecting the rents of the share which he had bought; and that when, on the morning of the 17th, knowing that Dost Mahomed had collected a band of men to oppose them, and that he and some of his partisans had come down to Fakiroollah's bari with hostile intentions against them, they issued armed from Fakiroollah's bari, they so issued with a common object of fighting Dost Mahomed's party. The evidence, no doubt, shows, that Dost Mahomed's party were in a manner the aggressors on that morning, and had done acts for the express purpose of provoking Khan Saheb's party to come forth from Fakiroollah's bari, or which at least were calculated to provoke the latter; but on the other hand it is clear that Khan Saheb's party were quite willing to accept any challenge from Dost Mahomed or his party. The members of the two assemblies, or a large portion on each side,

were armed with deadly weapons, such as latties and spears, and on the side of Khan Saheb's party, at least there was a large number of professional fighting men. We look upon what took place, from the time that Khan Saheb's party issued from the bari until the death of Khoaz, as one continued fight, although it consisted of more than one stage; and we think that it was in the prosecution of the common object of fighting that Gariboollah was wounded and Khoaz killed.

We have not now before us the persons who actually inflicted the grievous hurt on the one and the death-wound on the other, but before considering the extent to which the five prisoners are responsible for what occurred, we will state the view that we take of the crimes committed by the wounding and killing.

As regards the wounding of the man Gariboollah, we consider that that has been proved most satisfactorily to be grievous hurt. The wound was a spear-wound, which penetrated the skin of the abdomen. It was a severe wound, and resulted in the man being, as the doctor proves, more than twenty days in hospital. But for the interposition of Providence, the man might have lost his life, for, if the spear had entered the abdomen, it probably would have ended in death.

With regard to the man who was killed, we are of opinion that the offence committed by killing him is culpable homicide, but does not amount to murder, inasmuch as Khoaz was an adult, and his death occurred in the course of a fight between two bodies of men who were deliberately fighting together, both sides being armed, or a greater part of the men on both sides being armed, with latties or spears, which are deadly weapons, and no unfair advantage appearing upon the evidence to have been taken by the one side over the other in the course of the fight.

On this point, I would refer to the case of *The Queen* v. *Kukier Mather* (1), decided on the 13th November 1877 by a Bench, of which I was a member. In that case I considered at some length what was the character of the offence where death was caused under circumstances similar to the present. I then held that the offence did not amount to murder, because it

(1) Unreported.

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came within the 5th exception to s. 300 of the Indian Penal Code. After alluding to the difference between the English and Indian law on the subject as regards voluntary culpable homicide by consent, I 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. If this reasoning is correct as regards a pair of combatants, fighting by premeditation, it equally applies to the members of two riots or 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."

Some of the Judges of this Court entertain a different view from mine (1) as to the applicability of the 5th exception to a case of a premeditated fight for two reasons,—*first*, because the party who is killed does not intend to get himself killed if he can help it. But the language of the exception is not confined to the case where a man consents to suffer death, but extends to the case where he consents to take the risk of death. Although it was Khoaz's intention to escape death if he could, yet he not the less ran the risk of death when an armed man he joined in encountering armed men, and he did this voluntarily, and therefore with his own consent.

The *second* reason is, because sudden fight forms the subject of an express exception, namely the 4th exception. Hence it is argued that the Legislature could not have intended that premeditated fight was one of the cases prescribed for by the 5th exception. This argument does not appear to me to be based upon a sound construction of the 5th exception. Consent voluntarily given by an adult, implies in every case premeditation. In *suttee*, which, according to the universal opinion, falls within the 5th exception, the widow deliberately intends to die by burning, and the relative who fires the funeral pyre, on which the widow mounts, deliberately and with the utmost premeditation, does an act with the intention that the widow shall be burned to death. There is nothing, therefore, in the

(1) See *Empress* v. *Rohimuddin*, I. L. R., 5 Calc., 31.

fact that the fight is premeditated, which ought to exclude it from the operation of the 5th exception. If, as I think, according to the common and natural meaning of the words, an armed man, who deliberately fights with another man whom he knows also to be armed, consents thereby to take the risk of death, why is the adversary who kills him to be excluded from the benefit of the 5th exception, because by another exception the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent in sudden fight are different from those where he slays him in premeditated fight, and if the Legislature intended that the offence of both should be only culpable homicide, the intention would naturally be shewn by the enactment of two distinct exceptions. Again, sudden fight is a distinction recognised by the English law of homicide, and the framers of the Code may easily be supposed to have for that occasion alone made sudden fight the subject of a distinct exception, without imputing to them the intention thereby implied, by excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is, that the 5th exception extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risk of the death with his own consent; and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight, and does not in any way bind the natural operation of the 5th exception.

(The learned Judge then went into the evidence as to the share each of the prisoners had taken in the riot, and varied the order of the Sessions Judge.)

The convictions and sentences passed by the Sessions Judge will therefore be .set aside, and the convictions and sentences which I have mentioned above will take their place.

FIELD, J.—I concur in the judgment which has just been delivered. I think that it is very clear that, on the morning of the 17th, a considerable number of armed lathials were collected in

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the village on the part of Khan Saheb, and a considerable number on the part of Dost Mahomed.

What actually occurred was this:—The constable having paid a visit to Dost Mahomed's bari, and having had reason to believe that a number of men were collected there, went over to Fakiroollah's bari, and there found the same state of things. It appears that a number of Dost Mahomed's people followed the constable, and took up a position on certain land belonging to one Dhunnoo Sircar, south of, and immediately adjoining, the homestead land of Fakiroollah. When the constable, having had a report written, and having sent it to the thannah by Bhugwan Chowkidar, came out of the cutcherry recently erected on Fakiroollah's land, south of his bari or homestead, Dost Mahomed represented to him that a number of armed men were collected within the homestead of Fakiroollah, and urged him (the constable) to arrest them. When the constable hesitated to do so, Dost Mahomed called his own men to assist him in carrying out his expressed intention of doing so himself. It would appear either that a considerable number of Dost Mahomed's men had remained behind at Dost Mahomed's bari, or that Dost Mahomed had miscalculated the strength of Fakiroollah's party. Be this as it may, Fakiroollah's people did not wait for Dost Mahomed's men to come on Fakiroollah's land, but they took the initiative, and crossed the boundary line into the land of Dhunnoo Sircar, and there the riot commenced, and first took place.

Under these circumstances I think it is impossible to say that Khan Saheb's party were acting on the defensive merely, or, in other words, were acting in the exercise of the right of private defence of person or property. It is quite clear that both parties were armed, and both parties were prepared to fight, and that a very trivial incident was sufficient to bring them into conflict. I think it is reasonable to say that, in entering upon that conflict, each party had for its object to fight for victory, and in doing so, knowingly and deliberately took upon itself the risks of the encounter; to this state of facts I agree that the 5th exception to s. 300 of the Penal Code is applicable, and I do not think it very material which party were, in the first instance, the actual aggressors, though this should be consi-

dered in awarding the punishment. When a man, being one of an armed band, and being himself armed with a deadly weapon, as there is evidence to shew that Khoaz, who was on this occasion killed, was armed, takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was, within the 4th clause of s. 300, committing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death or such bodily injury as is likely to cause death; and I think further that he committed such act without any excuse for incurring the risk of causing death or such injury as has just been mentioned. When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say that such person, within the meaning of exception 5, takes the risk of death with his own consent.

Order as to conviction and sentences varied.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF SHRISH CHUNDER MOOKHOPADHYA AND ANOTHER.*

Order of Civil Court authorising Lease of Minor's Property—Act XL of 1858, s. 18.

On an application under s. 18 of Act XL of 1858 for leave to deal with the property of an infant, the Civil Court is bound to determine the question, whether the proposed mode of dealing with it would, if sanctioned, be for the benefit of such infant: and the petition should contain all the materials reasonably required to enable the Court to decide that question.

The decision of Garth, C. J., in *Sikher Chund* v. *Dulputty Singh* (1) followed.

THIS was an application by Nitumbini Debi, the mother and guardian of her two minor sons, for leave, under s. 18 of Act XL of 1858, to lease out certain lands, the property of the infants. The Civil Court, on such application, made the following

* Appeal from Order, No. 156 of 1880, against the order of J. F. Browne, Esq., Officiating Judge of the 24-Pargannas, dated the 27th April 1880.

(1) I. L. R., 5 Calc., 363.