APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K. C.I.E., Chief Justice, and Mr. Justice Mookerjee.

SILAJIT MAHTO
v.
EMPEROR.*

1909
May 12.

Rioting—Common object established different from that laid in the charge—Common object not to enforce, but to maintain the actual enjoyment of a right—Right of private defence—Excess of that right—Penal Code (Act XLV of 1860) ss. 103 (4), 141 (4), 147, 323 and 324.

It is not a general proposition of law that a conviction under section 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge.

Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused:—

Held, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad.

Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently:—

Held, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 141 (*4*).

Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally:—

Held, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (*4*).

THE appellants, Silajit Mahto, Sudhakar, and four others, were tried before the Additional Sessions Judge of Chota

* Criminal Appeal No. 208 of 1909, against the order of J. N. Ghose, Additional Sessions Judge of Chota Nagpur, dated Feb. 8, 1909.

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Nagpur, with the aid of two assessors, and were convicted, on the 8th February 1909, all of them under section 147 of the Penal Code, and Silajit and Sudhakar further under sections 304 and 323 respectively. The two latter were sentenced to five and two years' respectively, and the rest to one year's, rigorous imprisonment each.

The facts of the case, as found by the Sessions Judge, were as follows. There was a long-standing dispute and litigation between the parties of the complainant and the accused regarding certain lands. The accused were in possession, but the complainant's party claimed the land from time to time, though they never succeeded in obtaining possession of it. On the morning of the 26th November 1908, both parties went to the land in large numbers armed with *lathis*, prepared for and anticipating a fight. The accused arrived earlier, and were engaged in cutting the crops when the complainant's party came up and a fight occurred in which Silajit fractured the skull of Brindaban Mahto with a *lathi*, ultimately causing his death, and Sudhakar and Motia Kumar inflicted simple hurt on Baburam Mahto. The accused were charged with "rioting with the common object of assaulting the complainant, Achambit Mahto and his men, who were cutting the paddy of their land, and thereby forcibly ousting them therefrom." The Sessions Judge found that the common object of the accused was not that stated in the charge, but to enforce their right by show and use of criminal force. He held, that the party of the accused went to the field armed and prepared to beat down the opposition which they anticipated to their cutting the paddy, and that they could not, therefore, according to the prevailing judicial opinion, claim any right of private defence, and in any case that, unless they kept within the limits of the right, they would constitute an unlawful assembly within section 141 (*4*) of the Penal Code. He held, further, that in fracturing the skull of one of the opposite party, while the wounds they received were slight, they had exceeded the right.

Babu Jyoti Prosad Sarbadhikari, for the appellants.

Babu Manmatha Nath Mukerji, for the Crown.

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JENKINS C.J. AND MOOKERJEE J. The six appellants before this Court have all been convicted under section 147 of the Indian Penal Code. One of them, Silajit Mahto, has also been convicted under section 304, and another, Sudhakar, has been convicted under section 323. Silajit has been sentenced to rigorous imprisonment for five years, Sudhakar to rigorous imprisonment for two years, and the other four appellants to one year each.

There is no real dispute as to the facts. The learned Sessions Judge has found that the appellants were in possession of their land, and were engaged in cutting the paddy which they had grown. The complainant's party came and attempted to cut the paddy; there was a fight, the result of which was that one man was seriously wounded and subsequently died. The learned Sessions Judge has held upon these facts that the accused are liable to be convicted under section 147 of the Indian Penal Code, inasmuch as they were members of an unlawful assembly, the common object of which was to enforce a right to property.

It has been argued before us that the conviction under section 147 cannot be sustained on two grounds: *first*, that the common object as stated in the charge has not been established; and, *secondly*, that upon the facts found, there was no unlawful assembly. In our opinion, each of these contentions is well-founded. The common object, as stated in the charge, was to assault the complainant and his men who were cutting the paddy of their land and thereby forcibly to oust them from the land. The common object which has been established upon the evidence, according to the Sessions Judge, was to *maintain* possession of the land by the accused persons. It cannot be laid down as a general proposition of law that a conviction under section 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is whether the common object established agrees in essential particulars with the common object as stated in the charge. In the present case there can be no doubt that the common

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object, as stated in the charge, has not been substantially established. It may, however, be further pointed out that under section 141, sub-section (*4*) of the Indian Penal Code, which alone is supposed to have any application to the present case, an assembly is unlawful if the common object is shown to be to enforce any right or supposed right. Upon the facts which have been established, the common object here was not to enforce any right or supposed right. It was rather to maintain undisturbed the actual enjoyment of a right. If so, no question of unlawful assembly arises. Under these circumstances, we must hold that the conviction under section 147 as regards all the appellants must be set aside.

As regards the second appellant, Sudhakar, he has been, as already stated, convicted also under section 323. It is argued on his behalf that he is entitled to claim the benefit of the right of private defence. In our opinion this defence is made out. He appears upon the evidence to have caused simple hurt to one of the assailants. He belonged to a party which was attacked by the complainants while he was in peaceful possession of his land. Under these circumstances, it cannot be said that he lost the right of private defence by causing simple hurt to one of his assailants. So far as Sudhakar is concerned, the conviction under section 323 must also be set aside.

So far as the appellant Silajit is concerned, his case stands on a somewhat different footing. It has been contended on his behalf that he is entitled to the benefit of section 103, subsection (*4*) of the Indian Penal Code. Unfortunately for him, however, the defence which he took in the Court below was that he was not present at the time of the occurrence. No evidence was, therefore, adduced on his behalf to establish the elements which must be proved before section 103 can be made applicable. It is not shown that he was under any apprehension that death or grievous hurt would be the consequence if he did not exercise his right of private defence. In his case, therefore, the conviction under section 304 must be maintained. As regards the sentence, however, we are of opinion that a sentence of five years' rigorous imprisonment is, in the

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circumstances of this case, too severe. He acted evidently upon grave provocation: he was in possession of the property, and he was attacked by a large number of armed people who tried to dispossess him and to carry away his crops. Under these circumstances, we reduce his sentence to two years' rigorous imprisonment. We acquit the other appellants and direct their release.

E. H. M.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DASARATH RAI
v
EMPEROR.*

1909

May 25.

Jurisdiction—Appeal—Trial of Summons Case—Conviction of Assault and Mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 244, 246, 529 (f), 556.

Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244.

Mudoosoodun Sha v. *Hari Dass Dass* (1) referred to.

A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the *sudder* sub-division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused.

The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so, is cured by s. 529 (*f*).

ON the 13th December 1908 the petition,ers, Dasarath Rai and another, who were servants of one Surja Prosad, the

* Criminal Revision No. 367 of 1909, against the order of J. T. Whitty, Joint Magistrate of Darbhanga, dated March 22, 1909.

(1) (1874) 22 W. R., Cr., 40.