APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1908
December 2.

BAIJNATH DHANUK
v.
EMPEROR.*

Rioting—Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting—Indian Penal Code (Act XLV of 1860), ss. 99, 147, 148, and 326.

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence; but if some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.

In the matter of Kalee Mundle (1) referred to.

Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attacked them, fatally wounding one and severely injuring another, it was *held* that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former.

CRIMINAL APPEAL.

THE appellants Baijnath Dhanuk and others were tried before the Sessions Court of Patna by a Jury on charges under sections 304, 326, and 148 of the Penal Code and, except Ram Sahai, also under section $\frac{304}{149}$ of the same Code. The Jury unanimously found Ram Sahai guilty under sections 326 and 148, and the appellants under section 147 of the Code, and acquitted the others. The Sessions Judge agreeing with the Jury convicted Ram Sahai and sentenced him to five and three years' rigorous imprisonment, respectively, on the two charges

* Criminal Appeal No. 705 of 1908, against the order of H. W. C. Carnduff, Sessions Judge of Patna, dated 30th July 1908.

(1) (1882) 10 C. L. R. 278.

proved against him, the appellants Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment each under section 147, and the other appellants to one year's rigorous imprisonment under section 147 of the Code. All the appellants were further bound down in the sum of Rs. 300 to keep the peace for one year.

The prosecution story was that one Rafiuddin had lands in Bokaila Khanda, which ever since his purchase, 6 years ago, he cultivated as *khud khast*. The accused, who were residents of two neighbouring villages, or their predecessors, at one time held *ryoti jotes* in Bokaila Khanda, but it was alleged that at the time of partition, before Rafiuddin's purchase, they were ousted and their lands converted into *khud khast*, and that Rafiuddin had continued in peaceful possession. It was also the case for the prosecution that the crop of *musouri* growing on the disputed land at the time of the occurrence belonged to him. The accused claimed the land as their *ryoti* holding and asserted that the crop was theirs. On the 20th February 1908, Rafiuddin's *badwaris* and *barahils* proceeded to the land with 40 or 50 labourers armed with small sticks, and cut some *musouri* of one plot, and were cutting the crop of another plot, when a body of men, numbering 100 to 150, who had collected at the *dalan* of the appellant Ghansyam, within sight of the land, went there and declared their intention of removing the reaped crop. The *badwaris* remonstrated, whereupon the appellant, Baijnath, gave an order to beat them and to seize the crop. Ram Sahai, then attacked one Jhummun of the opposite party with a sword, inflicting a mortal wound. The accused Ghansyam attacked Rafiuddin's men with a *garasa* (scythe), Ganouri with a *lobanda* (iron-shod stick) and the rest with *lathis*. The malik Rafiuddin's servants and labourers did not show fight, but ran away leaving Jhummun and Sheocharan on the ground.

Mr. P. L. Roy (*Babu Atulya Charan Bose* with him) for the appellants. The Judge has misdirected the Jury. He should have told them that, if the accused were justified in resisting the theft of their crops, they could not be

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considered as members of an unlawful assembly, with the common object charged, *viz.*, to assert a right to the land claimed by the malik, because some members of that assembly might have exceeded the right of private defence: see *In the matter of Kalee Mundle* (1).

The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown contended that all the appellants had exceeded the right of private defence.

HOLMWOOD AND RYVES JJ. This is an appeal by Baijnath Dhanuk and six other persons against the convictions and sentences passed by the Sessions Judge of Patna, who, agreeing with the unanimous verdict of the jury, sentenced Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment, and Mudhu Dhanuk, Dular Dhanuk, Teja Dhanuk and Bijai Dhanuk to one year's rigorous imprisonment each, under section 147 of the Indian Penal Code. They were also bound down to keep the peace in Rs. 300 for one year.

It appears on the allegation of the maliks that they had, at the time of partition, six or seven years ago, ousted the Dhanuks, who admittedly were the cultivating tenants of the lands in dispute, and the maliks in exercise of their alleged right were cutting some unripe *musouri* with the aid of their servants, who do not seem to have been armed with anything more formidable than short sticks. The labourers, who were cutting *musouri*, must have had some kind of cutting instruments for the purpose of reaping the crop. The allegation was that 100 or 200 of the Dhanuks, consisting of the men of the village which claims the land, and some related Dhanuks belonging to another village, came armed, one Ram Sahai with a sword, one Ghansyam with a *garasa*, one Ganouri with a *lobanda* and the rest with *lathies*, and attacked the malik's men. On the order of Baijnath, Ram Sahai stabbed the deceased in the vitals with a sword, and he

(1) (1882) 10 C. L. R. 278.

fell on the ground. In his dying declaration the deceased named the seven men before us and Bulak and Dahi, the two men, who were not on their trial before the Court of Sessions. He named no others. The Jury convicted all these men under section 147. They also convicted Ram Sahai under section 326 of the Indian Penal Code. The appeal of Ram Sahai was rejected by a Division Bench of this Court on the ground that there could be no possible doubt that he at any rate exceeded the right of private defence. The present appeal appears to have been admitted on the ground, which is the only ground now taken by the learned Counsel for the defence, that the Judge ought to have told the Jury that, if the accused were justified in resisting the theft of their crops, they could not be considered as members of an unlawful assembly, on the common object charged, namely, to assert a right on the land claimed by the maliks, because some members of that assembly might have exceeded the right of private defence. Now this, if established, would be a very good ground indeed for this appeal. But it seems to us that in no less than two passages in his charge to the Jury, the learned Judge has drawn the attention of the Jury to this point, and on the second occasion he spoke most specifically. We, of course, do not know how much he may have enlarged upon it, but these are only the heads of charge. He commences by pointing out to the Jury that, if they are "not satisfied that the crop was Raffiuddin's, and find in favour of the accused, then the latter had undoubtedly the right of private defence against the landlord's emissaries, and were justified in interfering and removing the crop themselves. But the right is strictly a limited right, and, if it is exceeded, the benefit of it as a plea is lost." He goes on to say "the *onus* is on the accused to show not only that he was exercising the right, but that he did not exceed it, and the *onus* may be discharged without adducing independent evidence." He, therefore, evidently considered that each man had to establish his case for himself. Later on, after explaining the duties of the Jury and the law on the subject, he says to the Jury "having found the actual facts for yourselves you must proceed in the

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light of these remarks to decide whether the accused exceeded the right in this case. If you find that the right was exceeded, then you should go on to consider the evidence of participation against each one of the accused individually." He then proceeds to summarise the evidence against each of them. The consideration of participation against each, which the learned Judge enjoins upon the Jury, is obviously the consideration upon which they had to decide, if the accused had exceeded the right of private defence, or rather, if the right of private defence had been exceeded by all or any of them. There is, therefore, clear indication in this passage that the Judge did warn the Jury not to place all the accused in the same category in respect of this right. But at the end of his charge he gave them a still more decided warning. In dealing with the case of Ram Sahai he says "you should also consider the question of the right of private defence with reference to the special and separate charge against Ram Sahai. Is he personally protected by that right as explained above? You may find that the rioters generally did not exceed their right, but it does not follow that Ram Sahai did not exceed his, if he acted in the manner alleged against a person armed apparently with at most a small stick." It is perfectly clear from this passage that the Judge drew the necessary distinction between persons, who had used weapons and used them in excess of the right of private defence, and persons about whom it was open to the Jury to find that they had not exceeded that right. It does not, therefore, appear to us that there was a misdirection. But we think it is perfectly clear that the Jury were moved to convict the persons they did by the fact that these were the only men, who were mentioned in the dying declaration of the deceased, and in connection with a ruling of this Court, which has been cited to us by the learned Counsel for the appellant, this view of the Jury becomes somewhat important. In *In the matter of Kalee Mundle* (1), a Division Bench of this Court observed: "when individual members of that assembly exceeded their right of private defence, did it become

(1) (1882) 10 C. L. R. 278, 280.

an unlawful assembly within the definition in section 141 of the Indian Penal Code? Such a conclusion could be supported, if the Judge had found under section 142of the Indian Penal Code, that all or some of the ryots, having become aware that the right of private defence had been exceeded by some members of the assembly, continued in it." In that case there was no indication that they did. In this case the Jury evidently were moved by the most patent consideration that these were the men, whom the deceased had seen and identified, when he was lying on the ground mortally wounded, under the order of the first accused, by Ram Sahai. He actually saw these men standing so near to him that he could identify them. This would lead to an inference by the Jury that there was an unlawful assembly, and that these men continued in the assembly, and aided and abetted the persons, who exceeded the right of private defence. As a matter of law we are inclined to hold that Baijnath, who gave the orders upon which Ram Sahai used a sword, would not be protected by any right of private defence, and it must be held that he exceeded that right. There is also another of the appellants, Ganouri Dhanuk, against whom there was evidence before the Jury that he used a *lobanda* (iron-shod *lathi*) upon the hand of one of the persons present. For these reasons we think that there was no misdirection, and that, even if the Jury thought that the remainder of the accused had the right of private defence, they were fully justified in finding that these seven men had not that right, or continued in the unlawful assembly after they knew that the right of private defence had been exceeded. We may mention that the number of persons acquitted by the Jury, possibly on the ground that they were acting in the exercise of the right of private defence, was 28 out of 36 charged before them. It is, therefore, clear that the Jury must have had special grounds for bringing in the verdict they did against these seven persons, and we cannot assign any other ground than that we have just now indicated.

The appeal will be dismissed, and the accused will serve out the rest of their sentences.

Appeal dismissed.

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