

APPELLATE CRIMINAL.

Before Mr. Justice Rampini and Mr. Justice Gupta.

DASARATH MANDAL

v.

EMPEROR.*

1907
Jan. 4.

Conviction—Conviction of an offence without specific charge—Misdirections to the jury.

If the accused are charged with an offence under s. 304 or with one under s. 325, they may be convicted of an offence under s. 323 of the Penal Code, though no charge under that section has been drawn up against them.

But when they are charged with those offences alleged to have been committed by another person in the course of a riot *i.e.*, when they are charged under (s. 147) 304 and 325 combined with s. 149 of the Penal Code and the commission of the riot is disbelieved, they should not be convicted of the offence under s. 323 in respect of their individual acts with which they are not charged and which are not imputed to them in the Judge's charge to the Jury.

The omission by the Judge in his charge to the Jury to mention the fact of the original witnesses named in the first information having been abandoned by the prosecution, of two of them having given evidence for the defence and of the witnesses actually examined for the prosecution being entirely new witnesses, is a sufficient misdirection to justify the setting aside of the conviction.

CRIMINAL APPEAL.

The case for the prosecution was that one Haran, who was in possession of a plot of land, was ploughing that plot with the assistance of some other men. One morning, the accused persons, accompanied by others and armed with *lathis*, came upon the land and attacked them and in that attack Dasrath, one of the accused, struck Haran so severely with a *lathi* on his head that he immediately fell down and died in consequence of the injury. The defence was that the plot of land belonged to and was in the possession of Dasarath's party, that they finding Haran and his people ploughing their land came there and protested, whereupon Haran went home, brought some *lathis*, which were distributed by his son Dinmanath amongst his people and a free fight ensued, in the course of which some of the accused's party got serious

* Criminal Appeal No. 1014 of 1906.

1907
 DASARATH
 MANDAL
 v.
 EMPEROR.

injuries, but they could not tell how and by whom Haran was so assaulted.

Before the committing Magistrate the prosecution did not examine any of the witnesses named in the first information, excepting only two, but examined a number of new witnesses. The two named in the first information, though related to the deceased Haran, supported in a manner the story for the defence. Before the Sessions Judge the prosecution examined only the new witnesses and the accused called and examined the two prosecution witnesses examined before the committing Magistrate as their own witnesses.

The case was tried by the Sessions Judge of Khulna with a jury.

Dasarath was charged under sections 304, 325 and 147 and the other three accused, Ratan, Kani and Gopal were charged under sections 304 and 325 and 147 read with section 149 of the Penal Code.

The Jury unanimously acquitted all the accused of the charges under section 147, but were of opinion that Dasarath was guilty under section 325 and the other three were guilty under section 323.

The Sessions Judge agreeing with the Jury convicted the accused accordingly.

Babu Sarat Chandra Roy Chowdry appeared on behalf of the appellants.

The Deputy Legal Remembrancer (Mr. Douglas White) appeared on behalf of the Crown.

RAMPINI AND GUPTA JJ. This is an appeal against the conviction of the accused, who have been convicted, the first Dasarath of an offence under section 325 of the Penal Code and the three others Ratan, Kanai and Gopal of an offence under section 323 of the Penal Code.

The accused were tried with the assistance of a Jury. The Judge has given effect to the unanimous verdict of the Jury. Hence the appeal is on the ground of misdirections in the Judge's charge.

The learned pleader for the appellants contends on behalf of the three accused Ratan, Kanai and Gopal that they were charged under sections 147 and 304 and 325 combined with section 149. They were acquitted under these sections, but convicted under section 323. Now the pleader for the appellant contends that these accused could not be convicted under section 323 of the Penal Code; as they were not charged with having caused hurt to the deceased Haran themselves, but only of rioting and of culpable homicide and grievous hurt committed in the course of the rioting, of all of which offences they have been acquitted.

1907
 DASARATH
 MANDAL
 v.
 EMPEROR.

With regard to the first accused Dasarath, the pleader urges (1) that the learned Judge has omitted to call the attention of the Jury to the fact that the witnesses for the prosecution named in ^{the} first information report were not examined by the prosecution in Court, (2) that the witnesses examined in Court for the prosecution were new witnesses and (3) that two of the witnesses, named in the first information report, Banshi and Sanaton, gave evidence for the defence and the former said that Haran had gone to his house and brought *lathis*, which were distributed by his son Dino Nath and that a fight subsequently ensued. He also urges that the Judge has misdirected the Jury as to the right of private defence in the following passage in his charge. "Supposing the accused to have been in actual possession of the land, can they plead that they were justified in using force to protect their property? Haran was not committing mischief by ploughing. Further, to be guilty of criminal trespass, Haran must have entered the land with intent to intimidate, annoy or insult the person in possession. There is no question of intent to insult or intimidate. Ploughing is a perfectly legitimate use to put land to, and if a man goes on to land, which he has no right to plough, he will not be going there necessarily to annoy. The intent to annoy must be shown independently of the entry. If this is not done, no case of criminal trespass is made out and the right of private defence will not arise."

We think the first of these contentions must prevail. Of course, if the three minor accused had been charged with an offence under section 304 or with one under section 325, they might have been convicted of an offence under section 323, though no

1907
 DASARATH
 MANDAL
 v.
 EMPEROR.

charge under that section had been drawn up against them. But they were charged with these offences alleged to have been committed by another person in the course of a riot. The Jury has found that there was no riot, and hence they should not in our opinion have been convicted of the offence of hurt in respect of their individual acts, with which they were not charged and of which there is no trace in the Judge's charge to the Jury of over having been imputed to them.

Then we consider that the Judge should have called the attention of the Jury to the fact of the original witnesses having been abandoned by the prosecution, of two of them having given evidence for the defence and of the witnesses examined in Court for the prosecution being entirely new witnesses.

We are not prepared to say that the Judge has misdirected the Jury as to the right of private defence. If the accused's party had been previously in possession of the land, with regard to which there was a dispute on the day of the occurrence, they were not in our opinion justified in arming themselves and in seeking by force to eject Haran and his party from the land, which, at the time of the occurrence, they were engaged in the peaceful occupation of ploughing.

We need not, however, discuss this question now. We consider there are sufficient misdirections in the Judge's charge to the Jury to justify our setting aside the conviction and sentences of the accused and our directing their retrial, which we accordingly do.

S. C. B.