APPELLATE CRIMINAL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

EMPEROR

v.

AMBIKA LAL.*

1908

Feb. 24.

Private defence, right of—Rioting—Attack by a large body of armed men prepared to fight—Penal Code (Act XLV of 1860), ss. 96 to 106, 147, $\frac{325}{149}$.

The complainant's party, consisting of twelve or thirteen persons, went with *kodalis* to a *bund* erected on the land of the master of the accused in order to cut it, as it obstructed the flow of water from their lands and destroyed their crops. The accused hearing of this at once assembled to the number of 50 or 60, armed themselves with *lathis* and proceeded to the *bund*. At this time the complainant's party had either finished the cutting or ceased to do so, when they saw the accused approaching. The latter attacked the complainant's party and drove them to their village. One or more of the assailants also beat a man, who was present there, but was not connected with the cutting of the *bund*, both in the first attack and when they returned from the chase, and fractured his skull, in consequence of which he died shortly after:—

Held, that the accused were members of an unlawful assembly from the beginning, as they went armed with *lathis* and in large numbers to enforce their right at all hazards, that, if not so at the beginning, they became an unlawful assembly, and had no right of private defence, when the opposite party had ceased cutting the *bund*, and that, even if they had, they exceeded their right by attacking their opponents and chasing them and by beating the deceased.

Shunker Singh v. *Burmah Mahto*(1), *Pachkauri* v. *Queen-Empress*(2) distinguished.

Kabiruddin v. *Emperor*(3) followed.

THE appellants, Ambika Lal and others, were tried before the Sessions Judge of Darbhanga with the aid of assessors under ss. 148 and $\frac{304}{149}$ of the Penal Code. The assessors found them not guilty, but the Judge convicted them under ss. 147 and $\frac{325}{149}$ of the Penal Code, and sentenced them as stated in the judgment of the High Court below.

* Criminal Appeal No. 40 of 1908, against the order of J. Johnston, Sessions Judge of Darbhanga, dated Dec. 17, 1908.

(1) (1875) 23 W. R. Cr. 25.

(2) (1897) I. L. R. 24 Calc. 686.

(3) (1908) I. L. R. 35 Calc. 368; 12 C. W. N. 384.

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It appeared that in Chait or Bysack of last year, Babu Ashrafi Singh, the employer of the accused and a zemindar, had an embankment erected on his own land in the village of Basopatti at a *dora*, or depression in the land, between two previously existing embankments, the result of which was that the flow of water from the land of the complainant Lalchand and others was interrupted and their crops destroyed. On the 24th August 1907 they filed a petition before the Subdivisional Officer alleging that their crops were being destroyed by inundation caused by the new *bund*, and praying for an order under s. 143 of the Criminal Procedure Code directing it to be cut. The Magistrate, by his order dated the 2nd September, ordered the old *bunds* to be kept up and the new one cut at once. The notice served on the accused was "have it cut down at once," whereas that served on the complainant was "let it be cut down at once." The complainant's party consisting of twelve or thirteen persons thereupon went to the new *bund* with *kodalis*, and proceeded to cut it and had either finished cutting or ceased to do so, when they saw the accused, fifty or sixty in number, armed with *lathis* approaching. The accused went up and attacked the complainant's party and chased them up to the well of their village. A man, named Chatri Das, who was not concerned in the cutting of the *bund*, but was standing near, was beaten by some one or more of the accused, not only in the first attack, but also when they returned after the chase and found the man lying on the ground, and he received a fracture of the skull from the effects of which he died a week after.

Babu Dasharathy Sanyal, for the appellants. The accused have committed no offence. The *bund*, which the complainant's party were cutting, was admittedly erected by the master of the accused entirely on his own land. He was in possession of it. The complainant and his men had not finished cutting when the accused came up. The appellants had a right to prevent the opposite party from proceeding further. They were not enforcing, but defending their right of possession and had the right of private defence: see *Queen* v. *MittoSing* (1) and *Birjoo Singh* v.

(1) (1865) 3 W. R. Cr. 41.

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Khub Lall(1). I rely principally on *Shunker Singh* v. *Burmah Mahto*(2) and *Pachkauri* v. *Queen-Empress*(3).

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. There are really two questions in the case: (i) had the accused exceeded their right of private defence? (ii) were they guilty of rioting? As to the first, there is no such right, where there is time to have recourse to the protection of the authorities, nor does it extend to the inflicting of more harm than is necessary for the purpose of defending one's property. Here the accused beat a man, who was not concerned in the cutting of the *bund*, and drove the complainant's party right to the well of the village. This was not necessary for their purpose. With regard to the second question, the accused were sixty in number, armed with *lathis*, and their common object was to punish the complainant. If the assembly was not unlawful, when it started, it became so, when it attacked the other side after the *bund* had already been cut: *Ganouri Lal Das* v. *Queen-Empress*(4), *Ragho Singh* v. *King-Emperor*(5), and *Mad. H. C. Pro., 8 Jan. 1873*(6).

RAMPINI AND SHARFUDDIN JJ. The appellants have been convicted by the Sessions Judge of Darbhanga of offences under sections 147 of the Penal Code and 325 read with section 149. They have all been sentenced under section 147 to undergo two years' rigorous imprisonment. No. 1, Ambika Lal, has been further ordered to pay a fine of Rs. 300, and the rest to pay fines of Rs. 30 each under section 147. Ambika Lal and Badar Dosadh, who is a chowkidar and whose duty, the Judge says, was to prevent a riot, instead of which he took part in one, have been further convicted under sections 325 and 149 of the Penal Code and sentenced to undergo four years' rigorous imprisonment, and the other accused have been convicted under the same sections and sentenced to undergo two years' rigorous imprisonment. But the sentences run concurrently.

(1) (1873) 19 W. R. Cr. 66.
(2) (1875) 23 W. R. Cr. 25.
(3) (1897) I. L. R. 24 Calc. 686.
(4) (1889) I. L. R. 16 Calc. 206.
(5) (1902) 6 C. W. N. 507.
(6) (1873) 7 Mad. H. C. Ap. xxxv.

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The assessors found the accused not guilty. One of them expressed an opinion that the action of the complainant was illegal and so the accused were entitled to be acquitted.

The judgment of the Sessions Judge is unfortunately very confused and wanting in lucidity. It is somewhat difficult to understand what his actual findings are.

But the facts are simple. In Chait or Bysack last year the accused's employer, Babu Ashrafi Singh, a zemindar, caused an embankment to be erected on his own land in the village of Basopatti at a place, where there was a depression in the land called a *dora*. There were two other embankments there from before. The most easterly belonged to the complainant Lallchand. The new embankment was erected between the two previously existing embankments. The lands of Babu Ashrafi Singh were on both sides of the new embankment, but this new *bund* undoubtedly interrupted the flow of water from the complainant's land and caused the destruction of his crops. The complainant complained to the Subdivisional Magistrate, Mr. Whitty, who after enquiry on the 2nd September last passed an order directing the new embankment to be cut. He served this order on both parties. His order issued to the complainant was, "let it be cut down at once." His order to the accused's party was, "have it cut down at once." It is unnecessary to consider whether these orders were legal or not. They are certainly most injudicious. Mr. Whitty should certainly not have interfered. He should have left the parties to settle their dispute in the Civil Court. There was no immediate apprehension of a breach of the peace. But Mr. Whitty's orders provoked and gave rise to a breach of the peace attended with loss of life. For, on the 12th September in the afternoon, the complainant's party, about twelve or thirteen in number, proceeded to make an opening in the new embankment so as to let the obstructed water flow off their lands. The accused's party learning of this at once assembled to the number of 50 or 60, armed with *lathis* and proceeded to drive off, chase and beat the complainant's men, who were chased right up to the well of their village. One unfortunate man, named Chatri Das, who was not cutting the *bund* and had not even a *kodali* or anything else in

his hand, but who was standing near the cutting in the embankment, had his skull fractured and died in consequence on the 19th September. The accused acted most cruelly and wantonly to Chatri Das, for the witness Chuni Sahu says: "Chatri Das was a *babaji* and not a man of the world, and had no connection of his own with the land near the *bund*." But the accused not only beat him at the time of the first attack, but returned and beat him again as he lay on the ground, when they came back from the well to which they had chased the complainant and his men.

The accused have, therefore, been convicted by the Judge of rioting and of grievous hurt committed in the course of a riot in prosecution of the common object of the unlawful assembly, which is described in the charge as being "to punish Chatri Das, Lalchand Mandal and others for cutting the *bund*," and which is found by the Judge to have been as much to take revenge on the complainant's party, for what they had already done, as to prevent their doing anything more.

The learned pleader, who appears on behalf of the appellants, contends that they have committed no offence. He does not admit that the cutting of the *bund* was complete when the accused's party came up, and urges that, whether or not, they did not form an unlawful assembly, that not more force was used than they were legally entitled to use, and that the attack on and the killing of Chatri Das were committed by some unknown persons, or persons, who acted individually and not in prosecution of the common object of the assembly.

We are unable to agree with the learned pleader as to the facts.

It is clear that the complainant's party had either finished cutting the opening in the *bund* or *ceased doing* so, when they saw the accused's party coming up in overwhelming numbers. The attack upon them, the beating and chasing of them up to the village well and the killing of Chatri Das, who, as has already been pointed out, was beaten both before and after the chasing up to the well, were quite unnecessary for the protection of the right of Babu Ashrafi Singh. The complainant's party were few in number and unarmed. They appear to have had no *lathis* in their hands. Some of the accused may have received

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some bruises, but they were probably inflicted in defence of the persons of the complainant's party.

Then, it is obvious that the accused's party was from the beginning an unlawful assembly. They went up armed with *lathis*, which are so often used with fatal effect as to be necessarily regarded as deadly weapons, intending to enforce their rights at all hazards. Even if it be admitted, for argument's sake, to have been a lawful assembly at first, it became an unlawful assembly the moment the complainant's party stopped cutting the opening in the *bund* and the accused chased and beat the complainant's party and killed Chatri Das. There was no necessity to chase, to beat or to kill, and hence, if the accused ever acted in exercise of their rights of private defence of property, they far exceeded these rights.

Chatri Das was no doubt killed by an unknown member or by unknown members of the accused's party, but seeing that the attack on him was committed in prosecution of the common object of the assembly, the members of it are liable to be punished for it under the provisions of section 149.

The Judge has held that the offence committed in killing Chatri Das was only grievous hurt, but in our opinion that offence amounted to culpable homicide not amounting to murder.

The learned pleader for the appellants has cited several cases decided by this Court, in which he urges the circumstances were similar to those of the present and the accused were held to have acted in the right of private defence and to have committed no offence. He contends that we are bound to follow these cases, and that, if we disagree with the decisions in them, to refer the question of the exercise of the right of private defence by the accused to the decision of a Full Bench.

The principal cases he relies on are *Shunker Singh* v. *Burmah Mahto*(1) and *Pachkauri* v. *Queen-Empress*(2). We have recently discussed these and all cognate cases, as well as the rulings with which they are in conflict, in the case of *Kabiruddin* v. *Emperor*(3). It is, therefore, unnecessary to examine them here in detail.

(1) (1875) 23 W. R. Cr. 25. (2) (1897) I. L. R. 24 Calc. 686.
(3) (1908) I. L. R. 35 Calc. 368; 12 C. W. N. 384.

It is sufficient to say, firstly, that the law on the subject is clear. The limits, within which the right of private defence may be exercised, are laid down in sections 96 to 106 of the Penal Code. We are bound to apply this law to the best of our judgment to the facts of this case. Secondly, the facts of none of the cases cited are exactly similar to those of the present, and thirdly, the decisions in these cases apply the law to the facts of the cases, which they decided. They lay down no general law and could not enunciate any general law in any way modifying the law of the Penal Code. There is, therefore, nothing which we could refer for the decision of a Full Bench.

In these circumstances we see no reason to interfere with the conviction of the accused by the Sessions Judge. The accused certainly all committed rioting and all of them are responsible for the offence committed on Chatri Das, be it grievous hurt or culpable homicide not amounting to murder. But this question is immaterial in case of all the accused, except Ambika Lal and Badar Dosadh, for the sentences on all the accused, except on Ambika and Badar, run concurrently. For the reasons assigned by the Judge, these two appellants seem deserving of more severe sentences than the others.

We, therefore, affirm the convictions and sentences and dismiss the appeal.

Appeal dismissed.

E. H. M.