

**Emperor Vs. Ahmed Hasham**

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**Court :** Mumbai

**Decided On :** Nov-30-1932

**Reported in :** (1933)35BOMLR240

**Judge :** Murphy and Broomfield, JJ.

**Appeal No. :** Criminal Appeal No. 470 of 1932

**Appellant :** Emperor

**Respondent :** Ahmed Hasham

**Disposition :** Appeal allowed

**Judgement :**

**Murphy, J.**

1. The appellant has been convicted, firstly, under Section 158, and secondly, under Sections 427 and 114 of the Indian Penal Code, and has been sentenced to three months' rigorous imprisonment and to pay a fine of Rs. 1000 for the first offence, and to one day's simple imprisonment and to pay a fine of Rs. 1000 or in default three months further rigorous imprisonment for the second offence.

2. The facts the prosecution set out to prove are, firstly, that he provoked a riot, and secondly, that he abetted the commission of mischief by a riotous crowd, by inciting it to commit this offence. It is obvious that Section 114 is a mistake, and

that it should be Section 109. Section 114 applies where a criminal first abets an offence to be committed by another person, and is subsequently present at its commission. Active abetment at the time of committing the offence is covered by Section 109, and Section 114 is clearly intended for an abetment previous to the actual commission of the crime, any time, that is, before the first steps have been taken to commit it. It is also doubtful in this case, we think, if Section 153 applies. Section 153 is as follows:-

Whoever maliciously, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished, &c.;

Although on direct inspection this section applies to the act of provoking a riot, that is giving occasion by an act or deed, which is illegal, for its occurrence, what the prosecution have relied on is an act of a different character.

3. It was sought to prove that the appellant urged the crowd, which on arrival he found already in a riotous temper, to wreck certain Moghul restaurants, that is. be instigated it to riot, and it seems clearly a case to which Section 153, which implies instigation in the sense of causing a riot by an illegal act which originates the feelings of anger of a so far peaceful assembly, does not prima facie apply. Though the distinction may sometimes be hard to draw the offence under Section 153 involves some act of origination of a riot, by doing an illegal act infuriating to the feelings of those who ultimately come to riot, at least some such idea is connoted by the expression 'gives provocation' rather than the converse one of abetment. The offence, if any here, was, we think, one under Sections 147 and 109, and not the one found by the learned Presidency Magistrate.

4. Turning to the facts, we are concerned with events which took place on October 31, 1931, at about 10.30 p.m., and again at 12.30 a.m. the same night, at Bhendy Bazaar, where the Sandhurst Road and the old J.J. Hospital Road cross. According to the evidence, there are several restaurants here owned by persons called 'Moghuls,' that is Persian Muhammadans. We are directly concerned with two of these, one called the Subhahulla Restaurant, and the second the Wazir

Restaurant, Though separately run, they are of the same ownership. The accused lives in the building, the ground floor of which is occupied by the Wazir Restaurant.

5. Trouble started that evening at about 10.30 p.m. owing to the spilling of some tea, which had been ordered by a motor-driver, who was seated in his car, outside the restaurant to be served to him and his friends in the car, from the Subhanulla Restaurant. The outside waiter clumsily spilt some of it over the driver, Munshikhan, who being incensed struck the waiter. The owner of the restaurant came out, and, what is called, remonstrated with Munshikhan. Munshikhan got down from his car in a threatening manner, and the restaurant owner retreated, but another man, who appears to be a hanger-on of the restaurant owner, one Bakar, took up the quarrel, and fought with Munshikhan, who seems to have been injured, though not very seriously, and he was ultimately taken to the J.J. Hospital. On this, an on-looker, called 'Cutlerywala' in the papers, brought a constable from the Maharbawdi Police Station, and explanations ensued and a crowd collected. At this point, it is said, the accused came down from the second floor of the building to his waiting car, intervened and then incited the crowd by the words 'Lagao Saleko, 1 shall spend rupee one to Rs. 10,000 if necessary,' The crowd dragged Bakar out of the restaurant and manhandled him, and the accused is said to have thrown a cup, which was outside the restaurant on a table, at the electric chandelier. The crowd, became threatening, and the Dongri police were rung up, and after some time Sub-Inspector Hakim came there, but when he arrived everything had admittedly quieted down, though the restaurant had been damaged to some extent. Munshikhan had been sent to the hospital, and the Sub-Inspector visited him at that place and found that he was not much injured. The evidence is that many hostile persons remained standing about outside the restaurants.

6. At about 12-30 a.m. the accused is said to have reappeared with his car, and trouble started again. The crowd stoned a third restaurant, known as the New Subhanulla Restaurant, and, it is said, that the accused again incited the crowd in similar terms to attack the Wazir Restaurant. It was closed by the keeper, who retreated, but was also damaged by the crowd, mostly owing to the throwing of stones, before it was closed. The police presently arrived and dispersed the mob, and the trouble ended. It appears that on the same night several other Moghul

restaurants were similarly attacked in the city. The owner of the Subhanaulla Restaurant, Mahomed Hussein Haji's complaint was recorded at about 8 a.m. the next morning. There is some confusion in it, for the first information report mentions another accused Abdul Rahiman, though the statement made by the complainant mentions the accused as Ahmed Shah. It appears that the former person has also been tried and convicted for rioting. The accused could not be found, and the record contains a series of telegrams, which passed between him and his relations, between Bombay and Calicut.

7. The accused's case is that he had gone to Calicut on business, and had not absconded, as alleged by the prosecution.

8. As found by the learned Presidency Magistrate, the convictions depend on witnesses, Exhibits 1, 2, 7 and 8 corroborated by the evidence of Exhibit 10, Witnesses Nos. 1 and 2 are complainants, the owners, or managers, of the two restaurants. Witness No. 7 is the cashier at the second restaurant. Witness No. 8 is Bakar, already mentioned, the hanger-on at the Subhanulla restaurant, and witness No. 10 is Mahomed Abbas, a taxi driver, who mentions the looting of a lorry by the crowd, not referred to by the other witnesses. His evidence, in general, does not specifically involve the present appellant.

9. [His Lordship then discussed the evidence and proceeded :]

10. We think that apart from the legally wrong convictions, which we have the power to set right in appeal, it would be dangerous to allow the convictions to remain, based as they are, on such slender foundations-

11. We, therefore, reverse the convictions recorded against and the sentences passed on the appellant, and direct that he be acquitted and discharged.

**Broomfield, J.**

12. I agree both on the merits and on the points of law, but desire to add certain remarks as to the latter.

13. First, as to the application of Section 153 of the Indian Penal Code, the accused in this case was really charged with instigation, or abetment, of rioting, and not provocation in the ordinary sense of that word. Technically, perhaps, the case might be brought within the scope of Section 153. In *Queen-Empress v. Kahanji I.L.R. (1893) Bom. 758* the language used both by Mr. Justice Jardine and by Mr. Justice Ranade seems to show that these learned Judges regarded instigation as equivalent to provocation, as the latter word is used in this section. But the point does not seem to have been argued in that case. Provocation which results in rioting may or may not amount to instigation or abetment of that offence. If it does, it is obviously more appropriate to charge abetment, which is the more serious offence. The fact that the offence under Section 153 is punishable with a maximum of six months imprisonment indicates that the section was intended to apply to such provocative words, or acts, as do not amount directly to instigation or abetment. One of the defence Witnesses in the case, Haji Abdulla Haji Jassim, in the course of his evidence deposed, as follows :-

A rumour then spread that an injured man had been removed to hospital and died there. This infuriated the mob. Some of them were heard to shout that the Moghuls had insulted the Muslim faith. By this I understood that the Moghuls who are Shias had insulted the Sunnis.

That affords an instance of conduct which might be provocation within the meaning of Section 153, although it would not amount to abetment of rioting. But this conduct was attributed to the mob in general and there is no suggestion that the accused himself used language of this kind.

14. Then, as regards Section 114 of the Code, the language of the section indicates that there must be evidence of abetment, that is instigation, conspiracy or aid, independent of and prior to anything done by the accused when present at the scene of the crime. The section cannot apply where the abetment alleged consists solely of things done at the time of the commission of the offence. There is the highest authority, including a ruling of the Privy Council, for holding that this is what the Legislature intended. I may refer to *Abhi Misser v. Lachmi Narain I.L.R. (1900) Cal. 566* *Ram Ranjan Roy v. Emperor I.L.R. (1914) Cal. 422* and the Privy

Council case of Barendra .Kumar Ghosh v. The King-Emperor

15. The matter is, I think, of some importance as this section has persistently been misapplied by the Magistrates, and in the last Criminal Session, over which I presided, a great many of the charges had to be amended by substituting Section 109 for Section 114.

16. I agree with my learned brother that this appeal must be allowed, and the convictions set aside.

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