

Kure and ors. Vs. Emperor

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Court : Allahabad

Decided On : Apr-17-1918

Reported in : AIR1919All379; 51Ind.Cas.677

Judge : Piggott, J.

Appellant : Kure and ors.

Respondent : Emperor

Judgement :

Piggott, J.

1. This is an appeal by five persons, Kure and his sons Dava, Khimma and Kalu and a caste-fellow and neighbour of theirs named Bhikan, who have been convicted on separate charges of offences punishable under Sections 147 and 323 of the Indian Penal Code and also of an offence punishable under Section 304A of the same Code It is common ground that on the night of the 28th of November last, being the night following the bathing festival of the Kartiki Puranmashi, there was an affray in the village of Shaudan between two parties of Chamars, in the course of which serious injuries were suffered and inflicted. The first report was made by the prosecution witness Bhaggan Chamar who brought to the Police Station his niece Musammat Kesi, a girl about 10 years of age. Kesi was at that time suffering from serious injuries on the head and she died shortly after having been sent to the dispensary. Bhaggan himself and his brother

Mukkha, father of the girl Kesi, were subsequently found to be suffering from injuries such as might have been received in the course of a lathi fight. On the other side the appellant Kure had received injuries on the head, on the left shoulder and on the left hand, and his right wrist was apparently broken, of his sons, Khimma had received a contused wound on the head and another injury of an unimportant nature, while Kalu and Dava were also slightly marked. The girl Kesi had received two distinct blows on the head by which the bones of the skull had been seriously fractured.

2. The evidence as to what took place is contradictory and unsatisfactory in many respects, as is not unfrequently the case where there has been an affray between two factions made up of men belonging to the same caste and residents of the same village. These Chamars usually live in some outlying portion of the village, and it would seem in the present case that the other residents of the village either heard nothing of this affair until it was over or did not think it worth while to concern themselves about a quarrel amongst their low caste neighbours. The only alleged eye-witness of the occurrence not a Chamar is a man of the name of Balle, a Jat by caste, who has been produced for the defence. He may have seen something of the affair, but his evidence, while supporting the case for the accused in its general outlines, seems to me most unsatisfactory and unreliable. He says that the fight was between Kure and his three sons on one side and a considerably larger number of persons, including the prosecution witnesses Bhaggan, Mukkha, Cheta and Bakhshi on the other. He gives a very vague account of what took place, suggesting in one part of his evidence that it was too dark for him to see much. He had to admit afterwards that it was bright moonlight, which, of course, it would be on the night in question. In one part of his evidence he says that he saw Kure fall to the ground and lying injured, and afterwards contradicts himself by saying that no one fell to the ground while he was present and that Kure must have done so after he had gone away. On his own showing he took exceedingly little interest in the business. The most significant part of his evidence is that he deposes to the presence of all three appellants Dava, Khimma and Kalu, whereas Kalu does not admit that he was in the village at all on the night in question. The stories told by the two parties are set forth in the judgment of the Court below and no good purpose would be served by my repeating them here. I very much doubt whether

the truth as to the origin of the affray has been told by either party. I see no reason to doubt that there was a fight in which five persons or more were concerned on each side, the common object on each side being to cause hurt to members of the opposite party. Putting aside as unreliable the evidence of Balle, I certainly do not find that the remaining two witnesses called for the defence, Musammat Manbhari and Chhuttan, suffice to show that the appellants now before me were acting in the lawful exercise of their right of private defence. It follows that they have been rightly convicted at least of rioting and causing hurt.

3. The question of the hurt caused to the girl Kesi is more difficult. The prosecution witnesses do not suggest that the accused intended to kill this child. Their case is that she happened to be sitting with her father and uncle when an attack was made upon them by the accused and that one or more of the accused must have hit her on the head in the course of the affray. I must take it that the man who struck these blows had no intention of causing this girl's death, or of causing injury likely to result in her death or any knowledge that he was likely to do so. The question is whether the provisions of Section 301 of the Indian Penal Code can be applied to the established facts so as to make the appellants, or any of them, guilty of, the offence of culpable homicide by reason of the injuries suffered by this child. I must take it that she was hit by blows intended for some other person and the question is as to the intention or knowledge with which those blows were struck. I think it may fairly be inferred that persons striking out violently with lathis in the course of a fight of this sort may be presumed to intend to cause at least grievous hurt, if grievous hurt actually results from the blows inflicted by them. Referring back to the provisions of Section 321 of the Indian Penal Code, and reading that section in connection with the one which immediately follows, it is obvious that the guilt of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person, he actually causes the intended hurt to that person or to some other. I think, therefore, that the appellants must be held guilty under the provisions of Section 325 read with those of Section 149 of the Indian Penal Code of having caused grievous hurt to the girl Kesi. The provisions of Section 304A, which have been invoked by the learned Sessions Judge, are quite inapplicable to the facts of this case. That section must be read along with Sections 336, 337 and 338 of the Indian Penal Code. All these

sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Where a man strikes at another with a lathi, he is committing a criminal offence independently altogether of any element of rashness which may be involved in his conduct by reason of the proximity of a child of tender years to the person at whom the blow is aimed. I set aside the conviction of all the appellants under Section 304 A of the Indian Penal Code, but in lieu thereof convict them under Section 325 read with Section 149 of the same Code.

4. I have felt considerable difficulty about the question of sentences. The learned Sessions Judge has passed cumulative sentences, the effect of which is to give each of the appellants a period of two years' rigorous imprisonment. From one point of view this is not excessive in a case in which death has been caused; but I am bound to say that, in the unsatisfactory state of the evidence, I feel reluctant to affirm so severe a sentence upon all the appellants. On the evidence I must take it that the death of this girl Kesi was an accident, something altogether apart from the intention of any of the persons concerned in the affray. I note also that in order to affirm the conviction under Section 325, Indian Penal Code, I have found it necessary to invoke the provisions of Section 149 of the same Code; and I do not think it sound as a general rule to pass cumulative sentences under Section 147 and some other section of the same Code, where the latter of the two sections can only be applied by the aid of the provisions of Section 149. The result is, therefore, that, while maintaining the sentence of one year's rigorous imprisonment passed by the learned Sessions Judge in connection with the fatal injuries caused to the girl Kesi, I direct that the sentences passed under the two charges (that is to say, under Sections 147, 323 and Sections 325, 149, Indian Penal Code) do run concurrently. The appeals are allowed to this extent and otherwise dismissed.