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Court : Kolkata

Decided On : May-06-1936

Reported in : AIR1936Cal429,165Ind.Cas.6

Appellant : Alkasulla and ors.

Respondent : Emperor

Judgement :

Henderson, J.

1. The appellants have all been convicted of rioting and sentenced to various terms of imprisonment. Two of them were also convicted under Section 323 I. P. C., but no separate sentence was passed. Unfortunately when the case came on at the trial the learned Judge adopted a procedure which has given us trouble in one or two other cases and the result is that it is quite impossible to uphold this verdict. The learned Deputy Legal Remembrancer, however, asked us in view of the prosecution case that the appellants' party were mortgagees attempting to get possession without the assistance of the Court to order a new trial on a suitably framed charge.

2. There can be as far as we can gather, no doubt whatever that this fight, in which persons on both sides were injured, took place in regard to the dispute about possession. The committing Magistrate took the commonsense view that if possession was really with the complainant, the common object of the accused

was to take possession themselves. In our opinion, that must be so. However, when the trial was taken up at the request of the Public Prosecutor, the learned Judge added the words ' and assaulting them'; the result was the introduction of not only inevitable but unjustifiable confusion. It is one thing to say that the common object was to get possession of the disputed land, it is quite another to say that the common object was to beat apparently for the mere pleasure of beating. It is quite wrong to include those two contradictory cases at the same trial even more so in one charge. The learned Judge dealt quite properly with the plain straightforward case which the prosecution originally made and he put the defence case with regard to the right of private defence in a manner to which no objection could be taken. Having done that, he went on to say this:

If you fail to find which of the parties was in possession, next consider the evidence whether the crown has been able to establish the alternative common object of assaulting the complainant's party. For this purpose, refer to the medical evidence. This shows that Farasatulla was fatally wounded, and Sukur Ulla and Mabarak Ulla were also wounded and it also shows that Gatha, a deadly weapon was used in the fight. You are to consider the evidence and decide whether the prosecution has established the existence of the common object of assaulting the complainant's party.

3. Unfortunately this was precisely what the jury did. The foreman said this:

We have not been able to find in whose possession the land in dispute is. In our decision, as regards conviction under Section 147, I. P. C., we have found that the common object of the assembly was that of assaulting the complainant's party.

4. When once the matter is logically examined, it becomes apparent that there was no justification for this at all. What the learned Judge told the jury to do really was that in the event of the prosecution failing to establish the case with which they came into Court or in the event of the jury being unable or too superior to come to a decision on the real point at issue between the parties, they were to consider the possibility as to the existence of another common object merely because certain persons were injured and weapons used, although in fact there never was a scrap of evidence to support the existence of this purely fictitious common object. What

the learned Judge ought to have done was to have struck this out of the charge altogether and never put it before the jury at all. It is perfectly idle for the prosecution to pretend that there was any common object other than that of taking possession of the disputed land and there was no evidence at all to support this alternative theory. We have considered the suggestion made by the learned Deputy Legal Remembrancer; but taking all the circumstances into consideration, we are not prepared to order a retrial. The appellants have already had a lengthy trial once and we do not see why they should be put in peril again because the prosecution has made a muddle of the case. The appeal, accordingly must be allowed and the conviction and sentence set aside. The appellants, who are on bail, will be discharged from their bail bonds.

Cunliffe, J.

5. I concur.

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