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Kitabdi Vs. Emperor

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Court : Kolkata

Decided On : Aug-21-1930

Reported in : AIR1931Cal450

Appellant : Kitabdi

Respondent : Emperor

Judgement :

Rankin, C.J.

1. In this case the appellant has been convicted of an offence under Section 147, I.P.C., and also of an offence under Section 304 read with Section 149, I. P.C. He has been sentenced to two years' rigorous imprisonment on the charge under Section 147 and to further two years' rigorous imprisonment on the charge under Section 304 read with Section 149, The sentences are to run consecutively,

2. The outline of the prosecution case is that, on 3rd April 1927, one Naibali was returning to his house with certain companions, that they passed the house of one Answar and that, when they reached the houses of Answar and Nasar, Nasar called out: 'Here is Naibali, come Samser and catch him.' On that, Answar and Nasar ran out and other people joined Nasar and pursued Naibali. Naibali appears to have been pursued by as many as five, all of them 'armed in one way or another. The prosecution story is that the accused Kitabdi, the appellant before us, came from the opposite direction, and as Naibali ran stopped him and seized him

by the right hand. His pursuers came up and one of them struck him with a cheni dao on the left side of the neck from behind. The accused Kitabdi was still catching hold of Naibali whan, the blow was struck. In this way Naibali dropped dead on the spot and his assailants absconded in different directions.

3. In this appeal one or two points have-been made on behalf of the appellant as regards the charge given to the jury. It is complained that the learned Judge has not sufficiently remarked upon the circumstance that there was some evidence that the witnesses were hostile to the accused and upon the circumstance that the witnesses who ware mentioned in the first information report had not been called. Upon an examination of the charge however it does not appear to me that there is any substance in these objections and that the charge taken as a whole cannot be regarded as inadequate or incorrect.

4. A point however, is made to the effect that when a person is charged with rioting under Section 147, I. P.C., and then by reason merely of being a party to the riot or unlawful assembly becomes liable under Section 304 on account that one of the other members of the unlawful assembly commits a fatal assault upon another person in prosecution of the [common object, the case comes within Section 71, I. P.C., and separate sentences are forbidden upon each of the two charges. That is a matter upon which there has been in different High Courts considerable difference of opinion. Section 71 is a section which contains somewhat general language and is followed by illustrations which are intended to throw light upon the meaning of the section. The only part with which we are concerned is the first part:

Where anything which is an offence is made up of parts any of which part is itself an offence.

5. The question here is whether the offence committed by the accused is not an offence made up of parts; that is to say, being a member of an unlawful assembly with a certain common object first part, and then, secondly, the element that a member of that unlawful assembly, in pursuance of the common object, fatally assaults a certain person. Different views may be taken upon the question whether, in view of the illustrations to Section 71, a case such as the present is really within the meaning of the first part of the section. Different views have been

taken upon this question. But in this Court the matter was decided by a Full Bench in the case of Nilmoney Poddar v. Queen-Empress [1894] 16 Cal. 442 (F.B.). There can be no doubt at all that that decision is exactly in point in this case. In the second place, there can be no doubt at all that it is a clear decision upon Section 71, I. P.C., and it has nothing whatever to do with Section 35, Criminal P.C. It is quite true that since 1923 Section 35, Criminal P. C, has been altered. It has been altered by removing the word ' distinct ' in the phrase ' distinct offences' and by removing the illustration. But that amendment of Section 35, Criminal P.C., in no way touches the authority of the Full Bench decision to which I have referred which is entirely a question of the meaning of Section 71, I.P.C., and that is the view which was recently taken and applied by the Patna High Court in the case of Bajo Singh v. Emperor A.I.R. 1929 Pat. 263. It does not appear to me that; it is open to us to take any other course than to follow the law laid down by that Full Bench decision. In that view the sentence of two years under Section 147, I. P.C., would have to be set aside.

6. But it is quite clear that the learned Judge in this case thought that, on the whole, four years rigorous imprisonment would be the proper punishment for this offence. Why he took the course that he did is not very evident to me because he could easily have given four years on the charge under Section 304, read with Section 149. If we are to raise the sentence on the charge under Section 304 read with Section 149 from two to four years, it appears to me that that can only be done under Section 439, Criminal P.C. In such a matter as this we must proceed strictly and give the fullest meaning to every provision of the Code which is in the interest of the accused. Our power merely as a Court of appeal includes all our powers of revision when there is a question of; giving relief to the appellant, When it is a question of acting against the appellant in enhancing the sentence, that, on the face of Section 439, Criminal P.C., has to be done under our revisional power as distinct from our power merely as a Court of appeal. That being so, we are bound to comply with Clauses (2) and (4), Section 439, before we can enhance the sentence even in this case because I have no doubt at all that technically it is a question of enhancing the sentence. That being so, it appears to me that the proper course to be adopted is to issue a rule to clay which will be served upon the learned advocate for the appellant requiring him to show cause next Thursday

morning at 11 o'clock why this sentence in respect of the charge under Section 304, read with Section 149, I.P.C., should not be enhanced. It may however be desirable, as we are prepared to deal with this case ourselves on Thursday, to say that, although there is perhaps some room for the contention that a sentence of four years in all would be inadequate considering that this man Kitabdi appears to have held the deceased man at the time while somebody else struck a fatal blow, on the whole we do not intend to raise any question of four years being inadequate. If this had been a case in which the learned Judge had given a sentence of four years under the charge, we would not have thought it necessary to issue the rule at all.

7. It has to be remembered that, although may be that this man could have been successfully charged under Section 304 by itself, he has in fact only been prosecuted for an offence under Section 304 constructively, that is, by the operation of Section 149. We do not intend to deal with this on the footing that he was guilty of the offence of culpable homicide by himself. He is merely guilty by reason of the fact that he was a member of the unlawful assembly when some one else committed the substantive offence of culpable homicide. In these circumstances, we will adjourn the further hearing of this appeal and pass final orders upon that at the same time when we will deal with the rule which we are issuing to-day.

C.C. Ghose, J.

6. I agree.

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