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QUEEN *v* SABAPATHI *et al.*

D. C., Jaffna, 1,604.

Riot—Penal Code, s. 144—Indictment—Averment of common object of the persons unlawfully assembled—Averment of use of criminal force—Criminal Procedure Code, 1898, s. 171—Error in stating offence.

Per BROWNE, A.P.J.—In cases of riot committed in carrying out the common object referred to in the first, third, fourth, and fifth clauses of section 138 of the Penal Code, the force should be crimnal force, but in carrying out the common object referred to in the second and sixth clauses the force used need not be criminal force. It is however not necessary to inquire whether, at the moment force was used, such force was used with criminal intent or not.

The common object of the rioters should be distinctly set out in the indictment. If the accused were in doubt as to the common object alleged, when called upon to plead they should apply to have the indictment made clear on the point, and then conviction cannot be avoided unless, in terms of section 171 of the Criminal Procedure Code, they have been misled by error or omission in the indictment.

IN this case nine men were charged with having been " members of an unlawful assembly, and having used force in prosecution of the common object of preventing a procession from moving along a road from Batticaloa to Kirimalie." The accused were Tamils of the Vellala caste and objected (as contrary to custom) to certain other Tamils of the Thachcha (carpenter) caste having a band of musicians to play at the head of a procession of carpenters going to perform a religious ceremony in connection with the death of a carpenter which occurred on the 31st January, 1899. The ceremony was to have been performed on the thirtieth day after the death, but owing to the opposition of the Vellalas it was put off for more than six months. A complaint was made to the Government Agent, and fourteen headmen were ordered to keep peace while the procession with music passed from the deceased's house to the temple where the ceremony was to take place. On the way the Vellalas threw stones at the procession ad turned it back. No one was hurt. Most of the accused were identified as persons who took a leading part in forcing the carpenters to abandon their journey to the temple with musicians playing at the head of the procession.

The District Judge acquitted the fifth and sixth accused, and found the remaining seven accused persons guilty of rioting, in breach of section 144 of the Penal Code, and sentenced them to pay each a fine of Rs. 100.

They appealed.

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Dornhorst, for appellant.—(1) The indictment is insufficient, as the common object alleged is not such as would render an assembly unlawful. It was seemingly intended to aver a common object of either the fourth or fifth clause specified in section 138 of the Penal Code, namely, by means of criminal force or show of criminal force to deprive any person of the enjoyment of a right of way, or to compel him to do what he is not legally bound to do, or omit to do what he is legally bound to do, but it was not averred that criminal force was used, or that there was a legal right of procession. (2) Nor has it been proved that there was a common object at all. The acts of stone throwing were the acts of individuals, and the presence of the accused was not shown to be due to any common object. (3) Nor has it been proved that the forced used was " criminal force " as defined by section 341 of the Penal Code.

Ramanathan, S.-G.—The accused having been sentenced to a fine of Rs. 100, no appeal lies under section 335 of the Criminal Procedure Code, except on a matter of law, and it has been decided that no point of law can be argued in appeal which has not been stated in the petition of appeal (P. C., Batticaloa, 13,801, 28th July, 1899). The first argument as to insufficiency of indictment, not being stated in the appeal petition, cannot be pressed now. In any case, the averment in the indictment that accused were " members of an unlawful assembly " implies averment of " criminal force." It is not necessary to aver that there was a legal right of procession, when the right alleged was on the face of it legal. There is evidence of the common object and use of criminal force.

Cur. adv. vult.

22nd January, 1900. BROWNE. A.P.J., after stating what he understood to be the contention for the appellant, said:—

I will at once say that no doubt the force used will always be criminal force in the instances of riot committed in carrying out the common object of classes first, fourth, and fifth of section 138, of which common object it was a large element, as also that of class third, since the force is there used " in order to the com- " mitting of any offence;" but that when riot is committed to carry out the common object of clauses second or sixth, which may not be criminal offences *per se* (seeing they have not been left to be included under the " other offence " of class third, but have been separately enumerated), the force used to constitute such riot need not be criminal force. But, indeed, in judging of whether riot has been constituted by an act of force or violence,

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it is not necessary to inquire whether, at the moment the force is used, there is criminal intent therewith, for in cases where the assembly is unlawful by reason of the use or display of criminal force being part of the common intent, it will already have been found to be existing to constitute the illegality of the assembly, and where it is unlawful without it, there is no need the force used should ever be of criminal intent.

Now, as to the first contention,—the form of the indictment, the rule undoubtedly is that enunciated by WITHERS, J., in 13,461, P. C., Tangalla, on the 17th July last, that it is necessary to state distinctly in the charge what is alleged to have been the common object of the assembly (*Mayne, p. 481*), but that under section 171 of the Criminal Procedure Code the accused must have been misled by any error or omission in the charge, or the conviction will be avoided by such error. In charges of unlawful assembly which may be tried summarily by a Police Court, it may be possible that accused may be misled by error or omission; but in cases of riot, which are tried after the taking of the depositions in the preliminary inquiry, there is far less possibility that the accused did not know what common intent was alleged against them. Were they in any doubt thereon when called on to plead to the indictment, or whenever in the course of the trial it might be in doubt which of several possibly chargeable common objects was that assigned, it might be expected they would say so; or even if conviction was as for one not apparently charged, I would expect the variance and the prejudice to be clearly shown. Here the common object is averred to have been to prevent a procession from moving along a road from Batticaloa to Kirimalai, and it is suggested that there was not shown the legal right of the procession so to do. I find, however, no suggestion in the evidence or the argument that the right did not exist, and when the procession was under the conduct of local officials, I consider the onus would be on the defendants to show its illegality in their defence.

As to whether the common object has been proved or not, there is, I consider, some evidence against each and all of the appellants that they were members of the crowd of which some, including seventh, eight, and ninth accused themselves, threw stones. The crowd numbered 100, and I consider its assemblage and acts showed its members had the common unlawful purpose of preventing the procession from proceeding and used force to carry it out.

Even if an appeal on law opens up the facts, I would see no reason to interfere.