

Present: Wood Renton C.J.

1914.

THE KING v. PERIS *et al.*

174-175—D. C. Colombo, 3,847.

Unlawful assembly—Penal Code, s. 138—"Other offence" not *ejusdem generis* with those immediately preceding.

The words "other offences" in clause 3 of section 138 of the Penal Code do not mean an offence *ejusdem generis* with those immediately preceding, namely, mischief and criminal trespass.

THE facts are set out in the judgment.

F. Obeyesekere, for the accused, appellants.

S. Obeyesekere, C.C., for the respondent.

November 19, 1914. WOOD RENTON C.J.—

This case raises an interesting question of law. The accused were charged, on a number of counts, with unlawful assembly, with the common intention of committing grievous hurt, and various kindred offences. They have been convicted and sentenced to heavy terms of imprisonment. The appellants' counsel has contended that the convictions on the counts of unlawful assembly are bad, inasmuch as the common intention alleged is to commit offences other than those specified in the various clauses of section 138 of the Penal Code, and in support of that contention he relies upon a decision of Mr. Justice Withers in *Muriwara v. Danta*,¹ and of Mr. Justice Pereira in *King v. Carupiah*,² to the effect that the words "other offence" in clause 3 of section 138, the only clause in which the term "offence" occurs in that section, mean an offence *ejusdem generis* with those immediately preceding, namely, mischief and criminal trespass. The clause in question is no doubt awkwardly expressed. But there is an instructive commentary in Gour on the history and scope of the corresponding clause in section 141 of the Indian Penal Code. "Strictly speaking," says that learned commentator, "the other offence must be *ejusdem generis*, otherwise the preceding enumeration was unnecessary. If the clause, then, means to 'commit any offence,' why should it have specified, of all others, the two offences of mischief or criminal trespass? In the original draft the words used were 'or to commit any assault, mischief, or criminal trespass, or wrongfully to restrain any person, or to put any person in fear of hurt or of assault, or wantonly to insult or annoy any person.' The words enacted were subsequently substituted for these. But if this was necessary,

¹ (1895) 6 Tumb. 78.

² (1914) 17 N. L. R. 383; 1 Cooray's C. R. 52.

³ Gour. 568.

1914. the retention of the words ' mischief or criminal trespass ' has not improved the sense. However, the clause is intended to include all offences both against person or property, and not only mischief, criminal trespass, and (offences) *ejusdem generis*. " It would seem, therefore, that the words " mischief or criminal trespass " have been retained in the Indian Penal Code *per incuriam*, and that our own Penal Code has repeated the mistake. The same view is expressed very briefly in Ratanlal on the *Law of Crimes* 259, where in commenting upon the term " offence " he refers to section 40 of the Indian Penal Code, which is practically identical with section 38 of our own Code, and which appears to me to show that a wider interpretation should be put on the term " offence " in the clause with which we are here concerned than that which it has received in the cases above referred to. The view of Gour is in accordance with the English law as to unlawful assembly. In Stephen's *Digest of the Criminal Law of England*, art. 75, the assembly, according to English rule, of three or more persons with intent to commit " any crime by force or violence " is said to constitute an unlawful assembly. On these grounds I hold that the point of law taken in favour of the accused must fail, and after having carefully read the evidence, I see no reason to differ from the finding of the learned District Judge upon the facts.

Appeal dismissed.

