(1924) 11 CAL CK 0058

Calcutta High Court

Case No: None

Ahed Fakir and Others		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Nov. 12, 1924

Acts Referred:

- Penal Code, 1860 (IPC) - Section 147, 149

Citation: AIR 1925 Cal 1235 : 87 Ind. Cas. 98

Judgement

1. The appellants before us were put on their trial on several charges. They were all charged with rioting punishable u/s 147, Indian Penal Code. The appellant, Ahed Fakir, was charged with having committed culpable homicide not amounting, to murder by causing the death of Mohorulla. The other appellants were charged with being constructively guilty of culpable homicide under the provisions of Section 149, Indian Penal Code, and one of the appellants, Baksu Fakir, was charged with committing simple Court with a dangerous weapon to one Omed Ali. The Jury unanimously found all the appellants guilty of rioting. They found Ahed Fakir guilty of the minor offence of voluntarily causing grievous hurt to Mohorulla. On the other charges they returned a verdict of not guilty. The main facts of the case appear to be as follows: Khos Mahmud and Lal Mahmud ahas Tunya are two brothers. Their father Lost Mahmud died about four years ago leaving some laud, which was inherited by these two. The land in the present case is it plot of six cottas of land which, according to the evidence of the prosecution, was let out in barga to the witness Mohitalla during the year 1922. On the expiration of the barga lease it is said that Mohitulla held over as bargadar and grew kalai on she land in 1923. At the beginning of 1924, on the 2nd January, Khos Mahmud executed a kobala, Ex. 1, purporting to sell him this six cottas of land. On the 5th January last, in the early morning, Mohitulla and his stepson Monu went to plough the land. When they were ploughing they were resisted by the appellants, who succeeded in turning Mohitulla and Monu out of the land. At about 10 a. m., some hours later, Mohorulla, the

brother of Mohitulla, and others came to the land, where the appellants still were, and a fight took place, in the course of which Mohorulla received injuries, which fractured two of his ribs, and ruptured his spleen, and caused his death. Injuries were also received both by the appellants and several of the witnesses for the prosecution.

2. The learned Sessions Judge in summing up the case to the jury has stated the facts and the evidence in our opinion fairly. But he had fallen into a serious error in directing the jury on an important point of law. He has told the jury that "" if the actual possession of the land by Mohitulla is established then quite irrespective of the question whether Mohitulla acquired a valid title to the land by the kobala, Ex. 1, from Khos Mahmud or of the question whether the title to the land rested with Khos Mahmud''s brother Lal Mahmud alias Tunya, the accused persons must be held to have formed members of an unlawful assembly if they had assembled with the common object of enforcing the right or supposed right of Tunya to the land in question by means of criminal force or show of criminal force." But in this case, having regard to the fact that there were two separate occurrences, the question whether Tunya on whose behalf the appellants were acting had title to the land is most material. From the charge as framed it is clear than the occurrence for which the appellants were put on their trial was the second occurrence. The charge of rioting, as originally framed by the committing Magistrate, referred to the assault on Mohitulla and others as paras of the unlawful common object. This charge was amended in the Sessions Court by striking off the words " and assaulting Mohitulla and others" and by the substitution of the name of Mohorulla in place of the words " she said Mohitulla." This shows that the appellants were charged with having committed rioting in connection with the second part of the occurrence when Mohorulla was wounded and not with reference to the first part of the occurrence when Mohitulla was driven from the land. With reference to this second part vi the occurrence the title of Tunya is most material as it cannot be held that the offence of rioting was then committed with the common object stated in the charge if in fact Tunya had good title to the land. From the evidence of the prosecution witnesses there is some evidence of Tunya''s title which should have been put before the Jury and their decision obtained, for instance even in the first information the place of occurrence is described in two separate sentences as Tunya''s land and Ahed Fakir who laid the first information has also in his deposition before the Sessions Court stated that Mohorulla was beaten and he fell on the land of Lal Mahmud, that, is, of Tunya. We also find another witness, Jomir Sheikh, stating that the disputed land originally belonged to Tunya. That Tunya originally had some interest in the land is not disputed and there is no clear evidence that be parted with this interest. The deed of sale to Mohitulla was executed by Khos Mahmud alone and purports to sell the whole of six cottas as Khos Mahmud''s property. It must, therefore, be said that the case put up on behalf of the appellants that Lal Mahmud alias Tunya was the real owner of the land was supported by some evidence before the Sessions Court,

and there should nave been a decision on She point. If it had been held that Tunya''s title to the land has been made out it cannot be said that during she second part of the occurrence the appellants ware acting with the common object set out in the charge, namely, of making forcible posses ion of the land in possession of Mohitulla. By 10 o''clock on the 5th January the appellants were already in possession of the land in dispute since they had turned out Mohitulla and his step-son in the early hours of that morning. If subsequently to the forcible possession which they then obtained they were holding the possession on behalf of Tunya in whom the legal right to possession was vested, it cannot be said that the complainant''s party had any right to forcibly eject them when they returned with force for that purpose. We must hold that this misdirection as to the necessity of deciding the title is a material one which has in fact occasioned'' a failure of justice.

3. There remains the conviction of Ahed Fakir u/s 325, Indian Penal Code. As regards this we can see no reason for reversing the verdict of the Jury. As we have already said the evidence has been fairly put to the Jury on the important facts. The only important point of non-direction, to which our attention has been drawn, is as to the statement made by Mohorulla. It would appear that Mohitulla, when he gave evidence before the investigating Sub-Inspector, stated that Mohorulla had told him that Ketu Fakir with Manik Fakir had struck him on the band with lathis and did not say that Mohorulla had told him that Ahed and'' Zahed struck him on the head with lathis. We do not think that this non-direction is of material importance. The important point was not who struck Mohorulla on the bead, but who struck the blow on the abdomen which fractured his ribs and ruptured his spleen. As regards the particular point the evidence appears to be one sided, and we cannot hold that the omission to draw specific attention by the Judge to the above-mentioned discrepancy has led to any miscarriage of justice. We do not think that it will serve any useful purpose to order a re- trial on the charge of rioting. We set aside the conviction and sentence of all the six appellants on the charge of rioting punishable u/s 147, Indian Penal Code. We uphold the conviction of Ahed Fakir u/s 825, Indian Penal Code, and the sentence of five years'' rigorous imprisonment pasted under that section.

4. The appellants other than Ahed Fakir will now be discharged from their bail bonds if they are on bail, or they should be released if they are in jail.