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appeal in this case ought to be allowed and the plaintiff's suit ought to be dismissed with costs in all the Courts.

GHOSE J. I agree.

MITTER J. I entirely agree in the judgment that has just been delivered by my Lord the Chief Justice and have nothing further to add.

S. M. *Appeal allowed*

CRIMINAL REVISION.

Before Suhrawardy and Cammiade J J.

DIBAKAR DAS

v.

SAKTIDHAR KABIRAJ*

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Jan. 20.

Charge—Omission to frame charge—Criminal Procedure Code (Act V of 1898)—Conviction on charge under s. 379 of the Penal Code—Alteration of conviction on appeal to one under s. 143 of the Penal Code—Legality of Procedure.

The conviction of an accused person for one offence cannot be altered on appeal to a conviction for a different offence with which he was not charged, where such alteration would prejudice the accused

Lala Ojha v. *Queen Empress* (1) and other cases referred to.

Begu and Others v. *King Emperor* (2) distinguished.

*Criminal Revision No. 1135 of of 1926 against the order of S. G. Hart, District Magistrate of Bankura, dated Sep. 9, 1926.

(1) (1899) I. L. R. 26 Calc. 863.

(2) (1925) L. R. 52 I. A. 191. 30 C. W. N. 581.

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DIBAKAR DAS v. SAKTIDHAR KABIRAJ.

CRIMINAL REVISION. One Debakar Das, the petitioner, was convicted of theft under section 379, I. P.C., on the allegation that he had cut a tree which did not belong to him and carried it off, on appeal the District Magistrate acquitted him of theft but convicted him under section 143, I. P. C., for going to the place with other armed men, against the conviction, the petitioner moved the High Court and obtained the present Rule.

Babu Debendranath Chatterjee and *Babu Narendra Krishna Basu*, for the petitioner.

Babu Birbhusan Dutt and *Babu Durgadas Roy*, for the opposite party.

SUHRAWARDY AND CAMMIADE JJ. The accused in this case was convicted by the Trial Magistrate of an offence under section 379, I. P. C., and sentenced to pay a fine of Rs. 60. On appeal the District Magistrate set aside the conviction under section 379, but convicted the accused under section 143, I. P. C., maintaining the sentence. This rule has been obtained on the ground that the procedure followed by the District Magistrate is not correct in law and the petitioner having been convicted under section 379, I. P. C., on the finding arrived at by the Appellate Court he should have been acquitted. The view that where a person is charged, under one offence and convicted of a different offence by the Appellate Court with which he was not charged it is beyond the power of an Appellate Court under section 423 (*b*) (*2*), has long prevailed in this Court. A case which is exactly in point is the case of *Jitu Singh and others* v. *Mahabir Singh* (1). There too the accused were convicted of theft and that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed but he convicted them for being

(1) (1900) I. L. R. 27 Calc. 660.

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members of an unlawful assembly. It was held that the accused were called upon to answer only the charge of theft and as they were never called upon to answer any other charge, they could not be convicted on appeal of an offence of an entirely different character. This view was subsequently followed in the case of *Yakubali* v. *Lethu Thakur* (1) where the accused were originally convicted of rioting which conviction was changed by the Sessions Judge on appeal to one under sections 448 and 323, I. P. C. A similar view was expressed in *Sita Ahir* v. *Emperor* (2) in which the further question that was not considered in the previous cases, namely, whether the defect was cured under section 535 or 537 *(a)*, Cr. P. C., was considered. The learned Judges held that the irregularity complained of was not curable under those sections. This point of view has now been, in our opinion, modified to some extent by the recent decision of the Judicial Committee in the case of *Begu and others* v. *King Emperor* (3). In that case the accused were charged under section 302, I. P. C., only but they were ultimately convicted under section 201, I. P. C., for concealing the body of the deceased. Their Lordships held on the construction of section 237, Cr. P. C., that the conviction was justified in law. It is, therefore, correct to say that the law as it stands at the present moment is that if on the facts proved of which the accused may be taken to have notice another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed, he may be convicted under sections 236 and 237, Cr. P. C., of the other offence. But we have to consider in each particular case as to whether the procedure followed by the Judge, though it may be strictly correct in law, is one which should

(1) (1902) I. L. R. 30 Calc. 288. (2) (1912) I. L. R. 40 Calc. 168.
(3) (1925) L. R. 52 I. A. 191.

be adopted in that case. The correct view seems to us to have been laid down in the case of *Lala Ojha* v. *Queen Empress* (1) where the law is thus stated: "If "the prosecution establishes certain acts constituting "an offence and the Court misapplies the law by char- "ging and convicting an accused person for an offence "other than that for which he should have been pro- "perly charged, and if notwithstanding such error the "accused by his defence endeavour to meet the accusa- "tion of the commission of these acts, then the "Appellate Court may alter the charge or finding "and convict him for an offence which those acts "properly constitute, provided the accused be not "prejudiced by the alteration in the finding. Such "an error is one of form rather than of substance". Applying the law as enunciated there to the facts of the case, we find that the accused was convicted by the Court of first instance on the allegation that the tree which he is said to have carried away did not belong to him. The trial Court did not come to any distinct finding with regard to the ownership of the tree but relying upon the settlement record it held that it must have belonged to the complainant. The lower Appellate Court has found that the accused and his men were under the *bonâ fide* belief that the tree belonged to their tenant and therefore they could not be convicted of theft. But as they had gone to the spot armed they ought to be convicted under section 143, I. P. C. We cannot say that in the present case the accused has not been prejudiced by the alteration of the conviction to one under section 143, I. P. C. The defence in the two cases must be distinct. In the case under section 379, the accused has only to establish his *bonâ fides*. In a case under section 143, I. P. C., he has to establish that the number was not more than five or that the object

(1) (1899) I. L. R. 26 Calc. 863.

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was not unlawful and that he did not attempt to enforce a lawful object by unlawful means. In this case the learned vakil for the petitioner says that he is in a position to prove that the persons who went armed with him were labourers who went to cut the tree and carry it. These are matters which could have been properly raised and tried if the original charge was under section 143, I. P. C. It is doubtful if the irregularity like the one in the present case can not be cured under section 535 or 536, as it is only a matter of omission to frame a charge or a defect in the charge. But as we have found that in this case the accused has been prejudiced in his defence by his not being called upon in the trial Court to meet a case under section 143, I. P. C., we hold that the conviction is not justified. There is also another point in the case, namely, that on the findings of the learned District Magistrate, the conviction under section 143, I. P. C., cannot be sustained. His finding is that the accused *bonâ fide* believed that he had a right to the tree; but he with others committed an offence for being members of an unlawful assembly because he went there with more than five persons armed with *lathis*. The mere fact that he went there armed with *lathis* with more than five persons will not ordinarily constitute an offence under section 143, I. P. C It is said that when the accused went to the spot there was no one there. So his object was not to use criminal force to get possession of the tree, but his object may on the other hand have been to resist any aggression by the other party. In the view that we take of these questions we are of opinion that the rule ought to be made absolute and we order accordingly. The conviction and sentence are set aside. The fine, if paid, will be refunded.

Rule absolute.

A. S. M. A.