Evidence Act and most property does not fall under these sections.

I cannot accept the argument raised under this section. The order I consider is plainly without jurisdiction and must be set aside. The petition is allowed with costs in both Courts. (Fee Rs. 50.)

K.W.R.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Bardswell.

IN RE PONNIAH LOPES AND SEVEN OTHERS (ACCUSED), PETITIONERS.*

1933, December 18.

Indian Penal Code (Act XLV of 1860), ss. 147 and 323 and ss. 149 and 325—Separate convictions and separate sentences—Legality of—Ss. 71 and 149 of Indian Penal Code—Sec. 35 of Criminal Procedure Code (Act V of 1898) after amendment—Effect of.

Separate sentences for an offence under sections 147 and 323, Indian Penal Code (Act XLV of 1860), on the one part and sections 149 and 325 on the other or indeed any constructive offence with reference to section 149 are illegal under the first paragraph of section 71, Indian Penal Code, even though the sentences are made to run concurrently.

Petitioners were convicted of offences under sections 147 and 323 and under sections 149 and 325, Indian Penal Code. For each of the convictions under sections 147 and 323 each of them was sentenced to six months rigorous imprisonment, and for each of the convictions under sections 149 and 325 each of them was sentenced to six months rigorous imprisonment, and the sentences were made to run concurrently.

Held, that the separate convictions in such cases were proper, but that the separate sentences though made to run concurrently should not have been passed.

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* Criminal Revision Case No. 359 of 1933.

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Nilmony Poddar v. *Queen-Empress,* (1889) I.L.R. 16 Calc. 442 (F.B.), and *Keamuddi Karikar* v. *Emperor,* (1923) I.L.R. 51 Calc. 79, affirmed and followed. *Emperor* v. *Piru Ram,* (1925) I.L.R. 49 Bom. 916, dissented from.

Section 149, Indian Penal Code, creates a specific offence and deals with the punishment of that offence.

Barendra Kumar Ghosh v. *King Emperor,* (1924) 29 C.W.N. 181 (P.C.), referred to.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Tinnevelly Division in Criminal Appeal No. 5 of 1933 preferred against the judgment of the Court of the First-class Sub-Magistrate of Tuticorin in Calendar Case No. 714 of 1932.

N. S. Mani for *A. Swaminatha Ayyar* for petitioners.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

Cur. adv. vult.

JUDGMENT.

BARDSWELL J. BARDSWELL J.—The petitioners were convicted by the First-class Magistrate of Tuticorin of offences punishable under sections 147, 323, 149 and 325, Indian Penal Code. For each of the convictions under sections 147 and 323 each of them was sentenced to six months rigorous imprisonment, and for each of the convictions under sections 149 and 325, Indian Penal Code, each of them was sentenced to twelve months rigorous imprisonment and the sentences were made to run concurrently. On appeal the Sessions Judge confirmed the convictions but reduced the sentences under sections 149 and 325 to six months rigorous imprisonment, the sentences, of course, to run

concurrently with those under sections 147 and 323, Indian Penal Code. An order to execute bonds for keeping the peace was set aside and with this we have nothing to do. The only point that has to be considered is whether there can be separate convictions and separate sentences for an offence punishable under section 147 and one punishable under sections 149 and 325 or indeed any constructive offence with reference to section 149.

As to the separate convictions in such cases being proper there appears to be no doubt. Such offences can be tried together under section 235, Criminal Procedure Code, and if they are tried together there can be convictions on them together. No authority that we have been referred to or that I have found for myself in this connection points to any other conclusion. Indeed the illustrations to section 235 make the matter plain. What remains then to be considered is whether, when there have been such separate convictions, separate sentences can be passed. A Bench of this Court in *Krishna Ayyar* v. *Emperor*(1) has remarked as follows :—

> "It has been well settled that where the object of an unlawful assembly is to cause hurt then a member of that unlawful assembly, if he is convicted under section 147, cannot be convicted also under section 323 or 325 read with section 149."

There however was no discussion of the matter in that decision, but merely a statement that the matter had been well settled. As a matter of fact there has been a conflict of opinion between one High Court and another as to whether separate

(1) (1918) 20 Cri. L.J. 145.

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sentences can be passed in such a case. There has been a general agreement amongst all the High Courts except that of Lahore that if a person is convicted of rioting and of a substantive offence of hurt of some kind he can be awarded separate sentences and this is what was held by this Bench in a case reported as *Sothavalan* v. *Rama Kone*(1). But that decision left undecided the point that is now before us, and it seems never to have been the matter of any authoritative decision in this Court.

A leading case on the subject is that in *Nilmony Poddar* v. *Queen-Empress*(2). There a majority of four Judges out of five held that separate sentences passed upon persons for the offences of rioting and grievous hurt were not legal where it was found that such persons individually did not commit any act which amounted to voluntarily causing hurt, but were guilty of that offence under section 149, Indian Penal Code. In the majority judgment it was remarked that

> "the offence of voluntarily causing hurt under section 324, coupled with section 149, Indian Penal Code, is primarily made up of two parts, viz.: (i) of their (the appellants in that case) being members of an unlawful assembly, by which force and violence were used in prosecution of its common object and the members of which were armed with deadly weapons; and (ii) of the offence of voluntarily causing hurt being committed by the two other members of the unlawful assembly in prosecution of the common object. The first of these two parts is itself an offence, viz., rioting armed with deadly weapons, under section 148, Indian Penal Code. It is nowhere expressly provided in law that, under the circumstances set forth above, the offender may be punished separately for the two offences constituted by the whole and the part respectively. Therefore we find that all the conditions laid down in paragraph 1 of section 71, Indian Penal Code, are present here. Consequently

(1) (1932) I.L.R 56 Mad. 481. (2) (1889) I.L.R. 16 Calc. 442 (F.B.).

the infliction of separate punishments for the two offences is illegal under it."

What is said will apply equally if the conviction as to rioting is under section 147 and not under section 148. More recently in *Keamuddi Karikar* v. *Emperor*(1), in which the Full Bench decision in *Nilmony Poddar* v. *Queen-Empress*(2) was followed, it was held that separate sentences under section 147 and sections 325 and 149, Indian Penal Code, are illegal under the first paragraph of section 71 even when they are made to run concurrently.

Another view has been taken in Bombay. In *Queen-Empress* v. *Bana Punja*(3), a Full Bench held that it was not illegal when a person is convicted of rioting and of hurt, and the conviction for hurt depends upon the application of section 149, Indian Penal Code, to pass two sentences one for rioting and one for hurt though at the same time it was held that, whether section 71, Indian Penal Code, applied or not, the total punishment that could be given should not exceed the maximum which the Court might pass for any one of the offences. In *Queen-Empress* v. *Malu*(4), however, another Full Bench held that a Court, in awarding punishment under the provisions of section 71, Indian Penal Code, should pass one sentence for either of the offences in question and not a separate one for each offence, though if two sentences were passed and the aggregate of these did not exceed the punishment provided by law for any one of the offences, or the jurisdiction of the Court, it would be only an irregularity. This view of section 71 was with reference to the

(1) (1923) I.L.R. 51 Calc. 79. (2) (1889) I.L.R. 16 Calc. 442 (F.B.).
(3) (1892) I.L.R. 17 Bom. 260. (F.B.). (4) (1899) I.L.R. 23 Bom. 706 (F.B.)

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illustration to section 35, Criminal Procedure Code, as it then stood, and the explanation to that section. Section 35, Criminal Procedure Code, however, has now been amended and it has been held in *Emperor* v. *Piru Rama*(1) that the result of that amendment has restored the previous view of the law as taken in *Queen-Empress* v. *Bana Punja*(2).

Section 35, Criminal Procedure Code, before its amendment in 1923 provided that, when a person is convicted at one trial of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict. And there was the explanation that separable offences which come within the provisions of section 71, Indian Penal Code, are not distinct offences within the meaning of this section. As amended, the section provides that when a person is convicted at one trial of two or more offences the Court may, subject to the provisions of section 71, Indian Penal Code, sentence him, for such offences, to the several punishments prescribed therefor which such Court is competent to inflict, and the explanation and illustration have been omitted. The Bombay High Court as has been shown finds that the alteration in the section has restored the previous view of the law. *Emperor* v. *Piru Rama*(1) does not, indeed, deal with section 149, but it is clear from the context and from the reference to *Keamuddi Karikar* v. *Emperor*(3), in which section 149 was directly under consideration, that its view was that the whole of what

(1) (1925) I.L.R. 49 Bom. 916. (2) (1892) I.L.R. 17 Bom. 260 (F.B.).
(3) (1923) I.L.R. 51 Calc. 79.

was laid down in *Queen-Empress* v. *Bana Punja*(1) was now good law. The Patna High Court, however, has held in *Bajo Singh* v. *King Emperor*(2) that there has been no such change in the law and that the reasoning in the passage from *Nilmony Poddar* v. *Queen-Empress*(3) that has already been quoted has not been invalidated by reason of the alteration in the section. The first part of section 71, Indian Penal Code, runs thus :—

"Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided."

The view taken in Bombay is that section 71 is not one that gives directions about mere sentences, but that it only deals with punishments and that therefore, as long as the sentences passed on a conviction for rioting and some form of constructive hurt do not exceed the term that can be awarded for one of those offences, the provisions of section 71 are complied with, in that the offender is not in the aggregate punished with more than the punishment which can be given to him for one of his offences. With respect I do not think the words

"the offender shall not be punished with the punishment of more than one of such offences"

should be so interpreted but think rather that the correct view is that taken in Calcutta. Taking it that in the constructive offence with reference to section 149 the offence of rioting is included, as in my opinion it is, then a person who is sentenced for rioting receives by that sentence his punishment for that offence. Any further

(1) (1892) I.L.R. 17 Bom. 260 (F.B.). (2) (1928) I.L.R. 8 Pat. 274.
(3) (1889) I.L.R. 16 Calc. 442 (F.B.).

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punishment that is given for a constructive offence under section 149 will again be a punishment for the rioting in that the rioting is included in the latter offence. I do not think that section 71 is intended to refer to the aggregate punishment, even though the section does not contain the word "sentence" but only speaks of punishments.

TOTTENHAM J. in his dissenting judgment in *Nilmony Poddar* v. *Queen-Empress*(1), at 447, felt himself unable to adopt the view of the majority and remarked :

> "I could perhaps do so if section 149 defined and made punishable any specific offence; but it does not do this. It simply declares that under certain circumstances every person who is a member of an unlawful assembly is guilty of the offence committed by some other member of it, whatever that offence may be; and, if he is guilty, I apprehend he is liable to be punished for it."

His view as to this was similar to that of a Bench of the Allahabad High Court in *Queen-Empress* v. *Bisheshar*(2), in which the view was taken that section 149 created no offence but was merely declaratory of the principles of Common Law which have prevailed at any rate in England. The Privy Council however has now held in *Barendar Kumar Ghosh* v. *King Emperor*(3) that section 149 creates a specific offence and deals with the punishment of that offence, and we have to regard the matter from that point of view. This pronouncement considerably affects the point of view from which this matter was regarded by TOTTENHAM J. and by the Allahabad High Court in the cases just referred to. We have to regard

(1) (1889) I.L.R. 16 Calc. 442 (F.B.). (2) (1887) I.L.R. 9 All. 645.
(3) (1924) 29 C.W.N. 181 (P.C.).

section 149 not merely as stating a principle but as constituting an offence as was indeed the view of the majority of the Judges in *Nilmony Poddar* v. *Queen-Empress*(1). My conclusion then is that that decision expresses the correct view of the law even as it stands to-day after the amendment of section 35, Criminal Procedure Code, which section is still subject to the provisions of section 71, Indian Penal Code.

The separate sentences, therefore, passed on the petitioners under sections 147 and 323, Indian Penal Code, on the one part and sections 149 and 325, Indian Penal Code, on the other are illegal. As, however, the sentences have been made to run concurrently and are both of the same length and such as the Court could legally pass, it is not necessary to make any reduction of sentence from the point of view of what should legally have been done. It is sufficient to state that separate sentences should not have been passed. Nor can the sentences for either conviction be deemed excessive in themselves. The seventh and eighth petitioners have served out their sentences. The remaining petitioners have only served out about two months of their terms. The riot in which they were concerned resulted in one man having his left arm fractured and it was they themselves who deliberately originated the riot. No reduction of punishment is called for in their case. They must serve out the unexpired portion of their terms of imprisonment.

BEASLEY C.J.—I agree.

K.W.R.

(1) (1889) I.L.R. 16 Calc. 442 (F.B.).