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shown to have been, and would not have had the opportunity of perpetrating the offences. Under these circumstances the sentences passed by the lower Court in respect of the second and third charges must be increased as follows:—Six months' rigorous imprisonment and a fine of Rs. 500 in respect of the second charge and conviction; in default of payment of the fine, six months' rigorous imprisonment in addition. In respect of the third charge, six months' rigorous imprisonment to commence at the expiry of the sentence in respect of the second charge. This will make altogether twelve months' rigorous imprisonment and Rs. 500 fine, and in default of payment of the fine, six months' rigorous imprisonment in addition.

Before Sir John Edge, Kt., Chief Justice.

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August 30.

QUEEN-EMPRESS *v.* KHARGA AND OTHERS.

Sessions Court—Addition of charge triable by any Magistrate—Power of Sessions Judge to add charge and try it—Criminal Procedure Code, ss. 28, 226, 236, 237, 537.

Subject to the other provisions of the Criminal Procedure Code, s. 28 gives power to the High Court and the Court of Session to try any offence under the Penal Code; and the provision it contains as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session.

Three persons were jointly committed for trial before the Court of Session two of them being charged with culpable homicide not amounting to murder of *J*, and the third with abetment of that offence. At the trial, the Sessions Judge added a charge against all the accused of causing hurt to *C*, and convicted them upon both the original charges and the added charge. The assault upon *C* took place either at the same time as or immediately after the attack which resulted in the death of *J*.

Held that the case did not come within the terms of s. 226 of the Criminal Procedure Code, and the adding of the charge was an irregularity which was not covered by ss. 236 and 237, those sections having no application to such a state of things; but that inasmuch as the Sessions Judge was addressed by the pleader who appeared for the accused, and heard all the objections raised, and witnesses might have been called for the defence upon the added charge, the provisions of s. 537 were applicable to the case.

Held also that the Sessions Judge had power, under s. 28 of the Code, to try the charge, assuming that he had power to add it.

THESE were appeals from a judgment of Mr. A. Cadell, Sessions Judge of Aligarh, dated the 23rd June, 1886, convicting the appel-

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lants, Kharga and Kuar Sen, of culpable homicide not amounting to murder and of causing hurt, and Nanhua of abetment of the former offence and of causing hurt.

Kharga, Kuar Sen, and Nanhua were jointly committed for trial before the Sessions Judge—Kharga and Kuar Sen charged with culpable homicide not amounting to murder of one Jaisukh, and Nanhua with the abetment of that offence. At the trial the Sessions Judge added a charge against all the appellants of causing hurt to one Chiddu, and he convicted them of the charges on which they were committed and on the charge which he added.

The main facts of the case, as found by the Sessions Judge, were as follows:—The deceased Jaisukh and the three appellants were near relatives, living in houses opening into a common court-yard. The deceased Jaisukh, his brother Chiddu, his cousin Nanhua, and some other *Kachis*, had gone to a wedding feast at a place about two miles from their home. On the way back there was some jesting about Nanhua having over-eaten himself and having been sick. When Jaisukh and his brother got home, the former told his own wife and Nanhua's wife the jest against Nanhua. On Nanhua's coming home his wife repeated the jest, and gave Jaisukh as her authority. Jaisukh came in about the time, and the dispute between the two resulted in Jaisukh being knocked down by a blow, which killed him. It appeared that Nanhua laid hold of Jaisukh's hands, and upon some abuse by Nanhua, Nanhua's brother Kharga hit Jaisukh over the head with the side-piece of a charpai, and Kuar Sen struck him also on the head with the end-piece of a charpai. Upon this Chiddu came down from the roof and was struck on the head by Kharga, and thrown down by Nanhua and Kuar Sen. Jaisukh died from the effect of the blows.

It was contended on behalf of the appellants that the Sessions Judge had no power to add the charge of causing hurt to Chiddu, or try them on that charge, and the convictions on that charge were therefore illegal.

Bábu *Baroda Prasad Ghose*, for the appellants.

The *Government Pleader* (Munshi *Ram Prasad*), for the Crown.

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EDGE, C. J.—The appellants here have been convicted under ss. 304 and $\frac{304}{109}$ of the Indian Penal Code, and they have also been convicted of an offence under s. 323 of the same Code. They were committed to the Sessions Court—Kharga and Kuar Sen under s. 304 and Nanhua under ss. $\frac{304}{109}$, but at the trial the Judge added the charge under s. 323, in respect of an assault upon a man called Chiddu. This assault took place at the same time as, or at any rate immediately after, the attack which resulted in the death of Jaisukh. It was objected, both here and in the Sessions Court, that the Sessions Judge had no power to add the charge under s. 323; and it is further argued that even if he had such power, he had no power to try such a charge. The first objection is met by the Government Pleader by referring to s. 226, Criminal Procedure Code, under which section he argues the Sessions Judge would be empowered to add such a charge. I very much doubt whether, under the circumstances, the Judge had power to add this charge under s. 323. In this case the prisoners were not committed "without a charge," for they were sent up on a charge on which they have been actually convicted. Nor can it be said that the charge was an "imperfect" charge, for it disclosed a separate offence. Nor yet is it an "erroneous" charge, for the evidence shows that the offence, as charged, was established. I therefore consider that this case does not come within the terms of s. 226 of the Criminal Procedure Code, and I consider that the adding of this charge was an irregularity in the proceedings. I do not think that it is covered by ss. 236 and 237 of the same Code. Those sections apply to a different state of things entirely. As to the second point taken in argument, I am of opinion that the Sessions Judge had power, under s. 28 of the Criminal Procedure Code, to try the charge, supposing he had power to add it. This section is a general section, which, subject to the other provisions of the Code, gives power to the High Court and the Court of Session to try any offence under the Indian Penal Code; and it also enacts that any offence under the Indian Penal Code may be tried "by any other Court by which such offence is shown in the eighth column of the second schedule to be triable." The provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or the Court of Session. Now, if it

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could be shown to me that the action of the Sessions Judge had caused a failure of justice and had prejudiced the accused in their defence, I should without hesitation set aside so much of the proceedings as related to the charge under s. 323. That a party might in some cases be so prejudiced is quite clear; but in this particular case the Sessions Judge was addressed by the gentleman who appeared for the prisoners, and he heard all the objections raised, and if the pleader had so desired, he might have called fresh witnesses as to this charge. This being so, I do not think that the objections now urged are of sufficient weight, and I consider that the provisions of s. 537 of the Code meet the case. As to the merits, I am of opinion that there is ample evidence to support the findings, and I do not see how the Judge could have come to any other conclusion than that the men were guilty. The appeals are dismissed.

Appeals dismissed.

CRIMINAL REVISIONAL.

1886
September 20.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.

Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness—Criminal Procedure Code, ss. 291, 540.

Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector