common object of the unlawful assembly were triable by assessors whose opinion was less final on a question of fact than the verdict of a jury.

We cannot tell on the facts before us for what reason the alteration of the charge was made. It was open to the learned Sessions Judge to add an alternative charge but I do not think that it was a proper exercise of discretion to withdraw the charge which the Committing Magistrate thought to be proved and put the accused under a disadvantage by substituting another so that he might be deprived of the right of trial by jury.

In my opinion, therefore, the trial was held without jurisdiction and the question is whether we should order a retrial. The answer to that question depends upon the evidence adduced.

[After considering the evidence his Lordship concluded that in the circumstances a fresh trial should not be ordered. The appellants were acquitted.]

KULWANT SAHAY, J.—I agree.

Convictions set aside.

CRIMINAL REFERENCE.

Before Adami and Bucknill, J.J.

FIRANGI SINGH

v.

DURGA SINGH.*

1925.

Oct., 29; Nov., 6.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 249, *applicability of, to warrant cases—Magistrate, power of, to start a fresh case upon a complaint, while the police case is already on the file.*

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* Criminal Reference no. 63 of 1925. Reference made by M. G. Hallett, Esq., I.C.S., District Magistrate of Gaya, dated the 25th July, 1925.

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An accused person in a warrant case was released by the Subdivisional Magistrate who purported to act under section 249 of the Code of Criminal Procedure. Subsequently, upon a complaint made by the informant in that case, the successor-in-office of the Magistrate summoned the accused.

Section 249, which appears in Chapter XX of the Code, the heading of which is "Of the Trial of Summons Cases by Magistrates", provides: "In any case instituted otherwise than upon complaint" a Magistrate "may..................stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction, and may thereupon release the accused".

Held, (*i*) that the order of release was invalid; (*ii*) that the case being still on the file of the Magistrate it could be reopened either upon application by the Crown or *suo motu* by the Magistrate; but (*iii*) that while the police case was already on the file of the Magistrate, he could not start a fresh case upon a complaint made by a private party.

The facts of the case material to this report are stated in the judgment of Bucknill, J.

Manohar Lal, in support of the reference.

H. L. Nandkeolyar, Assistant Government Advocate (with him *K. P. Jayaswal*), against the reference.

BUCKNILL, J.—This was a reference made to this Court by the District Magistrate of Gaya under the provisions of section 438 of the Criminal Procedure Code. This reference came before Macpherson, J., on the 2nd of September last and that learned Judge, thinking that a novel point arose in connection with it, referred the matter to a Bench; the learned Judge also considered that it was desirable that the Crown should appear.

The difficulties which have occasioned this reference arose out of some rather confused criminal proceedings; and to what appear to be some mistakes in procedure made by two Subdivisional Officers which under the circumstances are not perhaps surprising. The position may be thus shortly explained. Last October there was a dispute about irrigation between the inhabitants of two villages

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called Kunj and Chari in the Gaya district. As a result no less than three cases were started. What is called case no. 1 was a summons case; the charge was under section 143 of the Penal Code and was against the men of both the villages. What is called case no. 2 was a warrant case drawn up against certain persons under the provisions of sections 148, 323 and 430 of the Penal Code. It was against villagers of Kunj and in connection with that case a man of Chari village had been injured. What is called the third case was also a warrant case. This was directed against the villagers of Chari. All the cases came before the Subdivisional Officer. He tried case no. 2 but kept cases nos. 1 and 3 pending until the result of the trial with which he was proceeding. The upshot of case no. 2 was that he convicted the accused. He then, in respect of the case no. 1, passed an order (as he was entitled to do) under section 249 of the Code of Criminal Procedure stopping the proceedings and releasing the accused. In case no. 3 he also passed a similar order, purporting to act under section 249; he also directed the case to be entered as false. No question arose as to the Subdivisional Officer's power to deal as he did deal with the first case. But a question does arise whether he had any power to deal with case no. 3 (a warrant case) under the provisions of that section. But in case no. 2 there was an appeal and the Sessions Judge reversed the decision of the Subdivisional Officer, and set aside the conviction. The Subdivisional Officer's order of conviction took place on the 23rd March last and his two orders relating to case nos. 1 and 3 were made on the same day. The learned Sessions Judge's decision was on the 6th May last. The next thing which happened was that on the 16th June the person who had been the informant in the case no. 3 applied to the Subdivisional Officer (who was not the same individual as the Subdivisional Officer who had tried case no. 2) making what purports to be a complaint; at any rate he was examined on oath by the new Subdivisional Officer; he sent for the connected records

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and on the 26th of June he passed an order summoning the accused. The District Magistrate in his reference suggests that both the orders of the Subdivisional Officers of the 27th March, 1925, purporting to stop case no. 3 under the provisions of section 249 of the Code of Criminal Procedure and that of his successor of the 26th June summoning the accused on what appears to be a complaint made by the informant in case no. 3 are wrong and should be set aside. There seems no doubt that both these orders must be set aside. In the first place there appears to be no good authority of any kind for suggesting that section 249 can be utilized in respect of a warrant case. The heading of Chapter XX of the Code of Criminal Procedure which comprises sections 241—249 refers to the

"Trial of summons cases by Magistrates",

and, as has been pointed out by the learned Assistant Government Advocate, it is quite clear that, upon a perusal of sections 247—249, the last named section is only intended to apply to summons cases instituted other than upon complaint. It is true that Mr. Sohoni on page 614 of his work on the Code of Criminal Procedure (11th edition) seems to think that the procedure contemplated under section 249 might be applicable to warrant cases; but it is an old section and so far as can be ascertained there is no case which lays down such a proposition. Indeed from reading the preceding sections it certainly seems evident that section 249 only deals with summons cases instituted other than upon complaint. Section 247 relates to summonses issued upon complaint and what the Magistrate's duties are if the complainant does not appear. Section 248 contemplates the possibility of withdrawal of a complaint by a complainant whilst section 249 contemplates the powers of a Magistrate as to stopping cases and releasing the accused in any case instituted other than upon complaint. This order, therefore, thus made by the Subdivisional Officer on the 23rd March last is obviously one which he could not make and although it is in effect of no

value it is, I think, desirable, in order that there should be no future difficulty, that we should formally declare that it is illegal and, so far as may be, if at all necessary, set it aside.

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Now, although it has been suggested that what the complainant in case no. 3 did when he came up before the new Subdivisional Officer with his petition on the 16th of June last amounted only really to an informal drawing of the attention of the Subdivisional Officer to the fact that case no. 3 was still in existence on his file and had not been disposed of, I do not think that such a suggestion can on examination be seriously entertained; nor was it, I think, very seriously put forward by the learned Counsel who in effect appeared in support of what the Subdivisional Officer had directed by his order of the 26th June. The fact remains that it would seem that the Subdivisional Officer treated the petition as a complaint; he examined the accused on oath and in this way he seems to have treated the matter as one of which cognizance was being taken under the provisions of section 190 (*1*) (*b*) of the Code of Criminal Procedure; in other words as a fresh affair. It need hardly perhaps be pointed out that, as the order made by his predecessor on the 23rd March purporting to act under section 249 was void, the case was still really on his file and cognizance had already been taken of it under section 190 (*1*) (*a*). It has been suggested, somewhat tentatively, that the order in case no. 3 made by the Subdivisional Officer on the 27th March last, although purporting to be made under section 249, might be regarded as one made properly under section 253(*2*) as it is argued that the upshot is really the same and that it is merely a difference of form. I am not prepared to say that there is no difference in the effect of stopping a case under section 249 and the discharge of an accused under section 253(*2*); but in this case I do not think that such a question is material or really arises because the Subdivisional Officer expressly purported to deal with the matter under section 249 and in addition ordered that the case should be entered as false. Now

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in his order of the 26th June the new Subdivisional Officer after reciting what had previously taken place and the order made in the 3rd case observes :

"Durgi Singh who is the complainant in case no. 3 now comes up and files this petition that his case might now be taken up and dealt with according to law. His prayer seems reasonable. I accordingly summon the accused under sections 430 and 147, I. P. C. Also summon prosecution witnesses for that date."

Now the learned Assistant Government Advocate has pointed out that it was not open to the Subdivisional Officer to take any such action as he did in re-opening a warrant case which was already on his file on an application of a private party. It seems very clear that what the Subdivisional Officer actually did (although his order is not particularly lucid) was that he really started a case de novo; but this he could not do because case no. 3 was still really on his file. There seems no doubt that he thought that his predecessor's order with regard to case no. 3 was a valid one and that it was not was never brought to his notice. It is quite clear that he could not act as he did in re-opening the case supposing that what he did could be regarded as his having done so upon the application of a private party. The learned Assistant Government Advocate points out that the Subdivisional Officer could of course re-open the case either upon application by the Crown or suo motu; but in this case he did neither. Whilst the police case was already on his file he could not start a fresh case upon a complaint. There is no authority of any kind given to us to controvert the views which have been placed before us by the learned Assistant Government Advocate. We, therefore, consider (*a*) that the order of the Subdivisional Officer of the 27th March under section 249 of the Code of Criminal Procedure was altogether an invalid order. It is hereby set aside. The result is that the warrant case no. 3 is still on the file of the Subdivisional Officer. (*b*) The order of the Subdivisional Officer of the 26th June is also invalid; it too must be set aside. The result will be as before that the warrant case no. 3 is still on the Subdivisional Officer's file as it stood on

the 27th of March last at the time of the invalid order purporting to be made under section 249 with regard thereto. (c) The reference of the District Magistrate of 25th July, 1925, is therefore accepted. (d) The Subdivisional Officer either of his own motion or of course upon the application of the Crown may, if he so thinks fit, proceed with the warrant case no. 3.

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ADAMI, J.—I agree.

APPELLATE CIVIL.

Before Dawson Miller, C.J., and Foster, J.

SRI SRI BAIDYANATH JIU

v.

HAR DUTT DWARI.*

1925.

Nov., 6.

Limitation Act, 1908 (*Act IX of* 1908), *section* 10, *and Schedule I, Articles* 102, 120 *and* 131—*Suit to enforce payments due as remuneration arising out of a recurring right—right to be paid out of the proceeds of trust property—section* 10, *applicability of.*

Article 131, Limitation Act, 1908, prescribes the period for a suit "to establish a periodically recurring right". *Held,* that the Article has no application to a suit where the claim is not for the establishment of a periodically recurring right but for remuneration arising by reason of the right itself.

Lachmi Narain v. *Turab-un-Nissa* (1), approved.

Manevikrama Zamorin Raja Avergal of Calicut v. *R. P. Achutha Menon* (2) and *Sakharam Hari* v. *Lachmipriya Tirtha Swami* (3), dissented from.

* Second Appeal no. 625 of 1923, from a decision of R. E. Russell, Esq., I.C.S., District Judge of the Santal Parganas, dated the 7th May, 1923, affirming a decision of B. Satish Chandra Mukherji, Subordinate Judge of Deoghar, dated the 29th December, 1922.

(1) (1912) I. L. R. 34 All. 249. (2) (1915) I. L. R. 38 Mad. 916, F. B.

(3) (1910) I. L. R. 34 Bom. 349.