1925.

MAHARAJA KESHO PRASAD SINGH v. SHAMNANDAN RAI.

incurred in the first court will abide the result and will be disposed of by the learned Subordinate Judge.

We are informed that one of the plaintiffs is the representative in interest of one of the dead persons. If that be so, his interest has not passed by the execution sale. The learned Subordinate Judge in dealing with the case will bear this in mind.

ADAMI, J.—I agree.

Case remanded.

APPELLATE CRIMINAL.

Before Mullick and Kulwant Sahay, J.J.

1925.

Nov., 4, 5.

RAMSUNDAR ISSER

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *sections* 34, 149 *and* 436—*Notification making an offence under section* 436 *triable by a jury, whether applicable to a trial for an offence under section* 436 *read with section* 149.

Under section 269(1) of the Code of Criminal Procedure, 1898, "The Local Government may.....by order in the official Gazette direct that the trial.....of any particular class of offence, before any Court of Session, shall be by jury in any district".

By a notification published in the official Gazette on the 11th September, 1921, certain offences, including an offence under section 436, Penal Code, were directed to be tried by jury, in the district of Darbhanga. An accused person was committed by the Subdivisional Magistrate to the Court of Session for trial on charges of arson and abetment of arson. In the Session Court these charges were dropped and the accused was charged under section 436 read with section 149, and was tried by a Judge with the aid of assessors.

Held, that the effect of the notification was to make a charge under section 436 read with section 149 triable by jury, and, therefore, the trial by the Judge with the aid of assessors was void.

* Criminal Appeal no. 158 of 1925, from a decision of Rai Bahadur J. Chattarji, Sessions Judge of Darbhanga, dated the 29th August, 1925.

The appellants Amrit Gope, Ali Hussain and Gopal Dusadh were the peons of the appellants Ramsunder Isser and Jagdambi Isser. Ramdhani was the tenant of the maliks, Ramsunder and Jagdambi. He lodged an information at the police-station to the effect that the maliks had made an attack on his house and had caused his hut to be set on fire. The Sub-Inspector who investigated the case reported that the case was false.

Further investigations were then made by another Sub-Inspector and also an Inspector; but the police were unanimous that Ramdhani's complaint was not true and they declined to send up the accused for trial. The Subdivisional Magistrate, however, thought that there was a prima facie case and he directed a charge-sheet to be sent up against the five appellants and eventually he framed charges under section 436, Penal Code, and 436 read with 109 against the appellants and committed them for trial to the Court of Session.

In the Session Court the charge framed by the Subdivisional Magistrate upon the evidence recorded by him as regards the offence of arson and abetment of arson was dropped and a new charge of which there had been no mention in the Committing Magistrate's Court was added at the suggestion of the Public Prosecutor, namely, one under section 149 read with section 436, Penal Code. The alteration had an important bearing upon the trial. For in the Darbhanga district certain offences, including an offence under section 436, were specially enumerated in a notification published in the official Gazette on the 11th September, 1921, as triable by jury. All other offences remained triable by assessors. In the opinion of the learned Sessions Judge an offence under section 149 read with section 436 not being an offence under section 436 but a separate offence the accused could not claim the right of trial by jury.

For the purpose of understanding the arguments the facts appear sufficiently in the above head-note.

1925.

RAMSUNDAR ISSER v. KING-EMPEROR.

Hasan Imam (with him *Baikunth Nath Mitter*, and *G. N. Mukherjee*), for the appellant: I am entitled to be tried by a jury for an offence under section 436 read with section 149, Penal Code. Section 149 does not constitute an independent offence by itself. If an accused person is charged under section 149, he is virtually charged for the offence created by the section which is tied up with section 149. The appellant in the present case is really charged under section 436 but he is liable to be so charged by reason of section 149. The language of section 149 is entirely different from that of sections 109 and 511 which makes the abetment and attempt to commit an offence, a like offence; and the accused, though not really liable for the offence, is punishable in the same manner as if he were in fact liable. Hence these sections were specifically mentioned in the notification as triable by a jury, but a case covered by section 149 stands on a different footing.

[MULLICK, J.—But the Judicial Committee in *Barendra Kumar Ghosh* v. *King-Emperor* (1) says that section 149 creates a "specific offence".]

It creates a specific offence in this way: If *A* commits an offence he is guilty of that offence, but *B* by being a member of the unlawful assembly is liable for the same offence by reason only of section 149; in other words, had it not been for section 149, there would have been no offence.

[KULWANT SAHAY, J.—What is meant by "specific offence" is that although *B* does not actually commit the offence he is guilty for an offence created by section 149.]

I submit not. *A* by committing an offence is liable for it. *B* although not actually committing it, is also liable for that offence by reason of section 149. *B* is a sharer in the principal offence, and if he is to be charged and convicted for the offence, surely he is to be tried for the offence.

(1) (1925) I. L. R. 52 Cal 197, P. C.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown: The observation of Lord Sumner in *Barendra Kumar Ghosh* v. *The King-Emperor* (1) makes it clear that the offence under section 149 is a specific and separate offence. If an accused person is charged under section 436 read with section 149 he is really charged with an offence created by section 149. It is section 149 alone that makes him liable for the offence. A person charged under sections 109 and 511 stands in a similar position. He does not actually commit the offence but he is made liable by reason of sections 109 and 511. These two sections are specially mentioned in the notification which specifies the offences triable by a jury and the omission of section 149 therefrom is significant. I submit, therefore, on the authority of *Barendra Kumar Ghosh* v. *The King-Emperor* (1) that the Sessions Judge was right in treating section 149 as constituting a separate and specific offence not included in the notification and hence triable with the aid of assessors.

Hasan Imam, replied.

S. A. K.

MULLICK, J. (after stating the facts of the case, proceeded as follows): The first question that arises is one of jurisdiction. Was the learned Judge right in holding that a trial for an offence under section 149 read with section 436 and a trial for an offence under section 436 are trials for different offences so that the notification does not apply? It may be contended that neither section 34, Indian Penal Code, nor section 149 create distinct offences and that they are merely rules of evidence or of common law which fix liability upon joint wrong-doers. On the other hand it may be argued that just as specific provision has been made for abetments, attempts and conspiracies and they are treated as separate offences, so also does section 149 create a distinct and separate offence and

(1) (1925) I. L. R. 52 Cal. 197, P. C.

1925.

RAMSUNDAR ISSER v. KING-EMPEROR.

MULLICK, J.

that the offence of one who participated is not the same as that of him who set fire to the house. Some support for this view might at first sight seem to be furnished by the judgment of Lord Sumner in *Barendra Kumar Ghosh* v. *Emperor* (1). Lord Sumner there speaks of section 149 creating a specific offence and dealing with the punishment of that offence alone, but the learned Judge was there merely considering the difference between section 34, section 149 and section 114 of the Penal Code and in particular whether any of these sections were redundant and how far they overlapped. He came to the conclusion that although sections 34 and 149 overlap they do not wholly cover the same field, and as regards section 114 his opinion was that it was evidentiary and not punitory. The observations of his Lordship do not affect the questions now before us. It is true section 149 is an offence in respect of which there has been participation. It prescribes a new set of conditions to which the section shall become applicable but in the end the guilt of the person shall be the guilt attaching to the principal's crime. Now when the notification of the 11th September, 1921, declares that the trial of an offence under section 436 must be by jury and not by assessors it means that assessors are incompetent to determine whether a certain set of facts constitute the offence. It follows that the disability continues where the inquiry is whether upon the additional set of facts widening the field of liability prescribed in section 149 the accused has rendered himself punishable for the same offence. The trial remains a trial under section 436; the Court must always first determine whether that offence has been committed by an individual and next whether section 149 makes the participators responsible; and so it is with section 34 also. The trial in the present case was a trial for the offence of arson and by no stretch of argument can I persuade myself that the object of the notification was that while Amrit Gope would have been triable by a jury those who assisted in the prosecution of the

(1) (1925) I. L. R. 52 Cal. 197.

1925.

RAMSUNDAR ISSER v. KING-EMPEROR.

MULLICK, J.

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.*

* 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.