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manager. In the case before us the manager is not a party. He no doubt represents the minor in the litigation but it cannot be urged that he is a party to the litigation itself. In my opinion, therefore, the decision upon which the learned Subordinate Judge relies has no application to the facts of this case.

DAS, J.

I would allow this appeal, set aside the order passed by the Court below and dismiss the execution case. The appellant is entitled to his costs of this appeal.

ROSS, J.—I agree.

S. A. K.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Adami and Wort, JJ.

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Feb. 29.

RAMASRAY AHIR

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 149—*whether creates a substantive offence—failure to mention the section in the charge, whether fatal.*

Where the accused persons were originally charged with, and convicted for offences under sections 147 and 353, Penal Code, 1860, but on appeal convictions under sections 323 read with section 149, and section 353 read with section 149 were substituted for the original convictions.

Held, that section 149 does not create a definite offence and that, therefore, omission to mention the section in the charge did not vitiate the convictions.

Queen Empress v. *Bisheshar* (1) and *Theethumalai Gounder* v. *King-Emperor* (2), followed.

* Criminal Revision no. 73 of 1928, from an order of A. Davies, Esq., I.C.S., Sessions Judge of Shahabad, dated the 20th January, 1928, modifying the order of Babu S. P. Sahai, Deputy Magistrate, 1st Class of Arrah, dated the 22nd December, 1927.

(1) (1887) I. L. R. 9 All. 653.

(2) (1924) I. L. R. 47 Mad. 747, F. B.

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

M. Yunus, for the petitioners.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

WORT, J.—This is an application in revision by four persons who were convicted in the first place by the learned Magistrate of Arrah and whose conviction was affirmed on appeal to the learned Sessions Judge.

In the first instance before the Magistrate nine persons were charged but on appeal five of them were acquitted and the conviction of four, the petitioners before us, was affirmed.

They were originally charged under sections 147 and 353 of the Indian Penal Code. The common object alleged under section 147 was to assault a constable with a view to resist him and to rescue a certain prisoner whose name will presently be mentioned.

A number of points of law have been raised and argued in great detail by the learned Advocate for the applicants; but apart from those which I am about to state and others which will appear during the course of my judgment, the facts in the case are not material.

Apparently on the 11th October, 1927, an information against one Pillu, Munesar and Ekbal was received at the police-station and the Writer Head Constable in charge deputed a constable and a chaukidar to go to the village of Bhikhampur where the prisoners were supposed to be and to arrest them. They arrived at the village late at night and stayed at the house of one Baldeo Singh and early next morning, in fact before dawn, they arrived at the house of Ekbal and demanded that he should come out. In the events which happened it appears that Pillu came out of the house and was arrested and shortly what happened after that was that the other inmates of the house

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together with a number of people who had collected proceeded to rescue Pillu from the hands of the constable and in the course of doing so they assaulted the constable, broke his arm, and with other minor injuries he was eventually rendered unconscious.

As I have stated they were charged under sections 147 and 353. On appeal the learned Sessions Judge was of the opinion that the evidence did not disclose definitely which of the accused actually struck the constable and at whose hands he received the injuries which I have mentioned. In consequence he altered the conviction from one under sections 147 and 353 to a conviction under sections 149 and 323 and section 353 read with section 149.

The substantial question raised in this application is, by reason of convicting the four applicants under section 149, is the conviction bad because they were not charged under section 149. But before I come to deal with that question, another one arises which was the first point taken in the case. The substance of the argument on this first point was that the action of these nine people on the day of the occurrence on the 12th October, 1927, was not unlawful as the arrest of Pillu itself was not a legal arrest, and therefore they were exercising no more than their rights in rescuing Pillu from the hands of the constable. That depends upon a number of considerations. Obviously the first one is whether the arrest of Pillu was a lawful one or not, and the second one that arises out of it, whether the arrest of Pillu was lawful or not whether the applicants went beyond their rights in attacking as they did the constable. In my judgment it could not possibly be said that they were within their rights in attacking the constable in the manner they did and causing him the injuries which he received, and that, in my opinion, would dispose of that point by itself. But there are other matters which are to be considered and which, in my opinion, show that the first point at any rate is not one which can be sustained.

There is the clearest possible evidence in the case that the constable had information regarding a theft and consequently the case came within section 54 of the Code of Criminal Procedure which provides that

"Any police officer may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned."

Now both from the evidence and from the finding of both the Courts in this case it is clear that the provisions of this section have been complied with, and therefore, in my opinion, quite definitely the first point raised fails.

But the substantial question in the case is whether the conviction is bad by reason of the fact that the applicants were not originally charged under section 149 of the Penal Code. Without referring to the section in that behalf it is clear and well known, that if persons have committed an offence and they are to be tried for that offence they must be charged with that offence. The learned Advocate for the applicants states that they were not charged with this offence and therefore the conviction is bad. Obviously the argument depends upon whether section 149 provides for an offence or not. Quite apart from authority, on the plain reading of that section I would hold that section 149 of the Penal Code does not define any definite offence but merely provides that in certain circumstances persons may be convicted of an offence under the Indian Penal Code provided always that certain conditions are complied with. One of the authorities at any rate to which I shall refer puts the matter in another language as the judgment of Sir John Edge, C.J., of the Allahabad High Court states that section 149 does not provide for a separate offence but merely is a declaration that persons found in certain circumstances cannot set up as a defence the fact that they themselves did not commit that offence by their own hands. I refer to the case

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of *Queen Empress* v. *Bisheshar* (1). There one of the questions to be decided was whether section 149 created an offence or not; and reading from the head-note it is stated that section 149 of the Penal Code creates no offence but was intended to make it clear that an accused person whose case falls within its terms cannot put forward the defence that he did not with his own hands commit the offence committed in prosecution of the common object of the unlawful assembly. That substantially sets out the material part of the learned Chief Justice's judgment on this question. There is another authority on this point also, the case of *Theethumalai Gounder* v. *King Emperor* (2). The facts of the case there were different from the facts of the case which we have before us; but in order to come to a decision on the point which was at issue in that case it was necessary to discuss the same question, whether section 149 created an offence or not, and eventually the learned Judges of that Court made a reference to the Full Bench on this question amongst others. In the course of his judgment Phillips, J., said that in an unreported case the very question which we have had to debate in this case came up for decision and apparently the Madras High Court decided in that unreported case that where the charge was sufficiently clear the mere omission of section 149 from the charge was not sufficient to vitiate the conviction for the substantive offence. On reference to the Full Bench this question of section 149 came up for discussion. There, as in the decision by Sir John Edge, the same conclusion was arrived at that section 149 did not create an offence but was, as I have stated, merely a declaration that persons would be held liable for the substantive offence in certain circumstances. In my judgment, therefore, this section 149 does not create an offence. The question, therefore, of whether the applicants in this case were prejudiced or not seems

(1) (1887) I. L. R. 9 All. 653.
(2) (1924) I. L. R. 47 Mad. 747, F. B.

to me to be immaterial and for this reason if it is an offence then if they are not charged with that offence it becomes necessary to determine whether they have been prejudiced; but as I have found section 149 does not create an offence, then quite clearly the applicants had no right to have that section mentioned in the charge and it cannot be said, therefore, that there was any prejudice caused.

It is further argued that as a matter of practice section 149 is mentioned in a charge like this. This, therefore, needs consideration. But matters of practice cannot prevail over rules of law and it would be impossible, in my judgment, in this case to decide that the applicants were prejudiced because in some cases or generally section 149 is mentioned in the charge. Quite clearly in this case in any event the applicants had notice that an offence under section 353 had been committed. They were each charged with it, and their defence, in my view, must have been addressed to the same question whether section 149 was mentioned or whether it was not. I cannot see how it could be said in those circumstances that they could have been prejudiced in their defence by the omission to mention section 149.

Another important question has been argued and that is this. Originally nine people were charged under section 147. The learned Sessions Judge was of the opinion, as I have already mentioned, that the evidence was not sufficiently clear against five to identify them as being participants in this unlawful assembly. He therefore confirmed the conviction of four only. The learned Advocate for the applicants therefore argues that as only four have been found to have been members of this assembly it cannot be treated as an unlawful assembly within section 147 of the Penal Code. To hold that would be doing some violence to the evidence because the facts are simply these. The constable says that there were twenty people or so surrounding him, and that ten or eleven were either striking him or attempting to

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strike him. He purported to identify nine not as knowing them by name but as being able to identify them, and as I have stated the learned Sessions Judge was satisfied with the identification of four only. Can it be stated that although the constable is definite that there were some twenty people and as he was able to identify four only it shows that the assembly was not an unlawful assembly. In my opinion that cannot be so, for as I have said it would be doing violence to the evidence in this case and violence also to the true meaning of section 147. There is no doubt, in my opinion, from statements made in the judgment that there were more than five persons who composed this unlawful assembly and four of them have been identified and at any rate so far as that point is concerned in my judgment they were rightly convicted under section 147.

A further point which arises also for determination with regard to this last question is that Pillu could not in any event be said to have been a member of this unlawful assembly as the object of it was to rescue him. But the evidence is that as soon as Pillu was rescued he joined with the others in attacking the constable and if he makes himself in that manner a member of the unlawful assembly then it is clear that so far as that point at any rate is concerned Pillu was rightly convicted.

Next, a point has been raised as to the test identification and the learned Advocate argued perhaps somewhat faintly that it has not been properly proved. It appears that a report went in without any proper proof but on reference to the evidence in the case it appears that a note was made by the Magistrate of the fact that the report of the test identification went in and there was no objection from either the prosecution or the defence; that point must necessarily fail.

The other question was the question of sentence. Each of the applicants has been sentenced to undergo rigorous imprisonment for one year and also to pay

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a fine under section 147. Having regard to the gravity of the offence, attacking the constable in the exercise of his duty, and the conviction having been sustained, it seems to me impossible to interfere in our discretion with the sentences.

In discussing the point relating to section 149 of the Code I should have mentioned that learned Counsel referred us to a decision of the Calcutta High Court which gives a different view of the section from that of the cases to which I have referred. However on the plain reading of the section I would prefer to follow the decisions of the Allahabad and Madras High Courts.

WORT, J.

The rule is therefore discharged.

ADAMI, J.—I agree.

Rule discharged.

S. A. K.

APPELLATE CIVIL.

Before Das and Kulwant Sahay, JJ.

KHUB LAL SINGH

v.

RAGHUBANS NARAYAN SINGH.*

1928.

March, 2.

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XX, rule* 12—*mesne profits and compensation, distinction between —Court, jurisdiction of, to give decree for compensation in respect of a period subsequent to the institution of suit—Order awarding compensation, whether is appealable.*

An order determining the period within which compensation shall be payable is a decree and an appeal lies therefrom. *Bhup Indar Bahddur Singh* v. *Bijai Bahadur Singh* (1), *Nand Kumar Singh* v. *Bilas Ram Marwari* (2) and *Raja Peary Mohan Mookerjee* v. *Manohar Mookerjee* (3), followed.

* Appeal from Original Order no. 88 of 1927, from an order of Babu Gajadhar Prasad, Subordinate Judge of Monghyr, dated the 12th March, 1927.

(1) (1901) I. L. R. 23 All. 152. (2) (1918) 3 Pat. L. J. 67.
(3) (1922-23) 27 Cal. W. N. 989.