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BENGALI PARIDA v. BANCHHANIDHI PANIGRAHI.

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to make independent enquiry if the parties, having been given adequate opportunity, decline to adduce evidence as to possession. The Magistrate is then entitled to fall back on such information as he may have before him which would make him apprehensive of a breach of the peace. In the absence of material which would enable him to protect the possession of one or other of the parties he must attach the property.

I would reject the reference.

ROWLAND, J.—I agree.

REVISIONAL CRIMINAL.

1929.

July, 22.

Before Terrell, C. J. and Rowland, J.

MALTU GOPE

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 221, 233, 234, 235, 236, 237, 238, 239 and 537—*charge of rioting—specific acts of violence—charge against some of the accused—conviction of others for individual assaults, legality of—Penal Code*, 1860 (*Act XLV of* 1860), *section* 147.

Where, in a trial for offences under section 147 for rioting with the common object of assaulting certain persons, specific acts of violence are charged against some of the accused persons but not against others, the latter may nevertheless be convicted in respect of assaults proved to have been committed by them on persons referred to in the statement of the common object even though the charge of rioting fails, provided the court is satisfied that they have not been misled in their defence.

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*Criminal Revision no. 296 of 1929, from an order of R. B. Beevor, Esq., I.C.S., Additional Sessions Judge of Patna, dated the 15th March, 1929, affirming the order of Munshi Kamla Prasad, Assistant Sessions Judge of Patna, dated the 7th January, 1929.

Kantaneya v. *Emperor*(1), *Panchu Das* v. *Emperor*(2), *Dasrath Mandal* v. *Emperor*(3), *Muthukanakku Pillai* v. *Emperor*(4), *Hussein Sardar* v. *Kalu Sardar*(5), *Begu* v. *King-Emperor*(6), *Sita Ahir* v. *Emperor*(7) and *Abdul Rahman* v. *Emperor*(8), referred to.

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

Pande N. K. Sahay, for the petitioners.

S. N. Sahay, *Assistant Government Advocate*, for the Crown.

ROWLAND, J.—The petitioners were put on their trial along with others on charges of rioting and of being liable under section 149, Indian Penal Code, constructively for culpable homicide not amounting to murder of Nirpat Gop.

Specific acts of violence were charged against other accused persons but not against the applicants.

The jury with whose aid the Assistant Sessions Judge of Patna held the trial, found that there had been no rioting; that Bhuan and Jadu had committed the offences of causing hurt and grievous hurt as charged against them, and that Maltu and Kashi, petitioners, were guilty of assaults which had not been formally charged against them. The Assistant Sessions Judge convicted the petitioners under section 352, Indian Penal Code and their appeal having been dismissed by the Additional Sessions Judge of Patna, they have moved this Court in revision, contending that in the absence of specific charges against them of causing hurt or of assault, they could not in a trial on a different charge be

(1) (1911) 9 Ind. Cas. 455.
(2) (1907) I. L. R. 34 Cal. 698.
(3) (1907) I. L. R. 34 Cal. 325.
(4) (1921) 23 Cr. L. J. 306.
(5) (1902) I. L. R. 29 Cal. 481.
(6) (1925) I. L. R. 6 Lah. 226, P. C.
(7) (1912) I. L. R. 40 Cal. 168.
(8) (1926) 31 Cal. W. N. 271, P. C.

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convicted of this offence. Section 221(1) enacts that every charge shall state the offence with which the accused is charged; and section 221(4) requires that the section of law against which the offence is said to have been committed shall be mentioned. Section 233 enacts that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.

The Assistant Sessions Judge appears to have thought that when accused were charged with rioting having the common object to assault, they could be convicted of the assault as a minor offence constituted by some only of the particulars of which the offence charged consists, within the meaning of section 238, Criminal Procedure Code. Now it has been held by the Calcutta High Court in the case of *Kantaneya* v. *Emperor*(1) that a charge of rioting does not include as a minor offence any specific act of violence by an individual accused so as to authorise under section 238 a conviction under section 352, Indian Penal Code. This decision follows the principle of the cases of *Panchu Das*(2) referring to a conviction under section 325, and *Dasrath Mandal*(3), referring to a conviction under section 323. The Madras decision *Muthukanakku Pillai* v. *Emperor*(4) was a decision of a single Judge, and I think it must be conceded in this state of the authorities that section 238 cannot be invoked to support a conviction in circumstances like the present.

Nor can the fact that the offence under section 352 is punishable with less than six months' imprisonment and ordinarily triable as a summons case, avail to support the proposition that no charge is required

(1) (1911) 9 Ind. Cas. 455.
(2) (1907) I. L. R. 34 Cal. 698.
(3) (1907) I. L. R. 34 Cal. 825.
(4) (1921) 23 Cr. L. J. 206.

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to be framed in respect of the offence under section 352 if an accused is tried for it along with other offences under the provisions of section 235. The decision in *Hossein Sardar's*(1) case is against such a view.

In my opinion, however, the procedure followed by the Assistant Sessions Judge is within the provisions of sections 236 and 237 of the Code of Criminal Procedure. In section 236 it is enacted that if a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences or may be charged in the alternative with having committed some one of the said offences; while section 237 provides that if in the case mentioned in section 236 the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed though he was not charged with it. These sections, it has been held by their Lordships of the Privy Council, authorise the conviction of an offence under section 201, Indian Penal Code, of a person who was charged only with murder [*Begu* v. *King-Emperor*(2)] and I have no doubt that the conviction in the present case falls within the terms of the sections.

In saying this, I would not be understood to say that in every case falling within those sections it is proper to convict without framing a charge or would be proper to uphold a conviction. It is the duty of the Court in all cases to satisfy itself that the accused has not been misled in his defence. Section 232 of the Code says that if any person convicted of an offence has been misled in his defence by the absence of a charge or by an error in the charge a

(1) (1902) I. L. R. 29 Cal. 481.
(2) (1925) I. L. R. 6 Lah. 226, P. C.

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retrial is to be ordered; and I understand this as applying as well to cases in which the conviction was in compliance with the terms of the law as to cases in which the conviction was irregular. In such a case, as was observed in *Emperor* v. *Hossain Sardar*(1), "We are called on to consider in terms of section 232 of the Code of Criminal Procedure whether by the absence of such a charge the accused was misled in his defence." It was there held that the accused had in fact been misled and a retrial was ordered. In *Sita Ahir's*(2) case where on a charge under section 147 the trial Court had convicted and the Appellate Court had acquitted of that charge but convicted under section 323, it was held that accused was prejudiced by not having an opportunity in the trial Court to answer the charge under section 323 and a retrial was ordered.

The petitioners before us, however, cannot reasonably urge that they have been either prejudiced or misled in their defence. The common object of the unlawful assembly was stated in the charge to be to assault Nirpat and his companions and the acts of violence alleged which imported the further element to constitute rioting were assaults on these very persons. The allegation of assault by the petitioners on Nirpat and Gulab was in the First Information Report and in the evidence of all the eye witnesses. This allegation along with the whole story of the occurrence was challenged by the defence at the trial. There is nothing to suggest that there was anything else for them to do, had separate charges been framed.

On the facts of this case, therefore, had there even been an irregularity in procedure, I would have been reluctant to interfere as it seems manifest that there could be no prejudice and had there been a defect in procedure, it would be cured by sections

(1) (1902) I. L. R. 29 Cal. 481.
(2) (1912) I. L. R. 40 Cal. 168.

535 and 537 of the Code, prejudice to the accused being the real test as laid down by their Lordships of the Privy Council in *Abdur Rahman* v. *Emperor*.(1)

The application fails and is dismissed.

Courtney Terrell, C. J.—I agree.

Rule discharged.

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MALTU GOPE v. KING-EMPEROR.

ROWLAND, J

APPELLATE CRIMINAL.

Before Fazl Ali and Dhavle, J.J.

KRISHNA MAHARANA

v.

THE KING-EMPEROR.*

1929.

July, 23.

Penal Code, 1860 (*Act XLV of* 1860), *sections* 361 *and* 366—*Kidnapping—bonafide belief as to age—Seduction—Evidence Act*, 1872 (*Act I of* 1872), *section* 114, *Illustration* (*g*)—*Omission to examine witness.*

It is not a good defence to a charge under section 366 of the Penal Code that the accused honestly believed the kidnapped girl to be over 16 years of age.

Queen v. *Prince*(2), referred to.

A person may be guilty of kidnapping a girl for the purpose of seducing her to illicit intercourse even though he had also had such intercourse prior to the kidnapping.

Nga Ni Ta(3), referred to.

The omission by the prosecution to call a witness, who should have been called, merely gives rise to a presumption that the witness, if called, would not have supported the

*Criminal Appeal no. 3 of 1929, from a decision of D. E. Reuben, Esq., I.C.S., Sessions Judge of Cuttack, dated the 22nd April 1929.

(1) (1926) 31 Cal. W. N. 271. P. C.
(2) (1875) 44 L. J. M. C. 122.
(3) (1903) 10 Bur. L. R. 199.