REVISIONAL CRIMINAL.

Before Ross and Kulwant Sahay, JJ.

1926.

August, 3.

ABDUL HAMID

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 235, 269(3), 423(2), 494—*Joint trial of offences triable by jury and offences triable with the aid of assessors—acquittal on charges triable by jury—trial on other charges by some of the jurors as assessors—convictions—retrial ordered by appellate court—whether whole case re-opened—re-trial only on charges triable with the aid of assessors—validity of re-trial.*

Out of nineteen persons accused in the present case one was charged under section 436, Penal Code, ten others were charged under section 380 and all under section 147. The offences under sections 436 and 380 are triable by jury and the offence under section 147 by the Court of Sessions with the aid of assessors. The jury acquitted the accused of the charges under section 436 and 380. Four of the five jurors were appointed by the Assistant Sessions Judge for trial of the charge under section 147 and they were of opinion that the accused were not guilty. With respect to twelve of the accused persons the Judge differed from this opinion and convicted them. In appeal the Sessions Judge hold that the trial was illegal inasmuch as he was of opinion that under section 369(3), Criminal Procedure Code, all the five jurors should have been appointed as assessors; he ordered a re-trial of the twelve persons who had been convicted. The latter were re-tried on the charge under section 147, Penal Code, and the assessors were again of opinion that they were not guilty. The Assistant Sessions Judge differed from their opinion and convicted them. On appeal the Sessions Judge set aside the convictions of five of them. Of the remaining seven, five had originally been convicted on charges triable

* Criminal Revision no. 399 of 1926, from an order of S. B. Dhavle, Esq., I.C.S., Sessions Judge of Monghyr, dated the 27th of May, 1926, modifying the order of Babu Ram Chandra Chowdhury, Assistant Sessions Judge of Monghyr, dated the 10th of March, 1926, on remand, the original order being dated the 7th December, 1925; the order of retrial by the Sessions Judge is dated the 4th January 1926.

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by jury. All seven moved the High Court to order a re-trial on the ground, inter alia, that both the first and second trials were illegal.

Held, per *Ross*, *J.*—(*i*) that if the first trial was a nullity and if the accused persons considered that they were being prejudiced in the second trial by being tried only on the charge under section 147, Penal Code, they ought to have raised the objection before pleading to the charge; and that prejudice being a question of fact it was impossible to hold in revision that there had in fact been any prejudice;

Ram Krishna Reddi v. *Emperor* (1) and *Amiruddin* v. *Farid Sirkar* (2), referred to;

(*ii*) that the order of the Sessions Judge, since it did not contain any express words of limitation, had to be construed with reference to the proceedings before him, and inasmuch as the appeal before him was only in respect of the convictions under section 147, the order, by necessary implication directed a re-trial of the charge under section 147 only, and such a limited order was not bad;

Krishnadhan Mandal v. *Queen Empress* (3), *Nizamuddin* v. *Emperor* (4) and *Queen Empress* v. *Jabanulla* (5), referred to;

(*iii*) that where there has been the verdict of a jury acquitting the prisoners of certain charges, and that verdict has not been impugned by way of appeal by the Crown, it is opposed to principle that the prisoners should again be put on trial for the same offences.

Per *Kulwant Sahay*, *J.*—(*i*) where a joint trial is held under section 235, Criminal Procedure Code, and the accused is charged with offences some of which are triable by jury and some by the Sessions Judge with the aid of assessors, the joint trial must be held as provided by section 269(3) (i.e., all the jurors must be appointed as assessors) otherwise the whole trial is illegal; (*ii*) that the re-trial ordered by the Sessions Judge re-opened the whole case and the accused could have been tried again for all the offences originally charged. But at the re-trial it was open to the Public Prosecutor to confine himself to some only of the charges; (*iii*) that the failure of

(1) (1903) I. L. R. 26 Mad. 598.
(2) (1882) I. L. R. 8 Cal. 481.
(3) (1895) I. L. R. 22 Cal. 377.
(4) (1913) I. L. R. 40 Cal. 163.
(5) (1896) I. L. R. 23 Cal. 975.

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the Public Prosecutor to obtain the sanction of the court under section 494, Criminal Procedure Code, to the withdrawal of a charge, is a mere irregularity.

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

ROSS, J.

Hasan Imam (with him *S. Sharfuddin* and *S. P. Varma*), for the petitioners.

H. L. Nandkeolyar (Assistant Government Advocate), for the Crown.

Ross, J.—As the result of an occurrence which took place on the 1st of April, 1925, nineteen persons were committed to the Court of Session at Monghyr for trial. One was charged under section 436 of the Indian Penal Code, ten under section 380 and all under section 147. The charges under section 436 and 380 were triable by jury and the charge under section 147 by the Court of Sessions with the aid of the jurors as assessors under section 269 (*3*) of the Code of Criminal Procedure. The Assistant Sessions Judge, who tried the case, appointed only four of the five jurors as assessors. The jury unanimously found the accused not guilty under sections 436 and 380 and they were acquitted. The four assessors were of opinion that the nineteen accused were not guilty under section 147. The Assistant Sessions Judge differed from them with regard to twelve of the accused and convicted them and sentenced them to eight months' rigorous imprisonment each, acquitting the other seven. These twelve persons appealed to the Sessions Judge who held that the trial was illegal, because only four of the jurors had been chosen as assessors instead of the whole five; and he set aside the conviction and ordered a retrial. These twelve persons were retried under section 147 only; and the four assessors were again of opinion that they were not guilty. The Assistant Sessions Judge again differed from the assessors and, convicting them under section 147, passed the same sentence as before. Five were acquitted by the Sessions Judge on appeal

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while the appeals of the remaining seven were dismissed. It is now contended on behalf of the seven petitioners in revision that both the first and the second trials were illegal and that therefore there ought to be a retrial of the petitioners (five of whom had been committed for trial on charges triable by jury) on all the original charges; secondly, that the Courts below have made errors of record and have failed to consider material evidence and that there ought to be at least a rehearing of the appeal; and, thirdly, that in view of the nature of the occurrence and the manner in which the petitioners have been harassed by these protracted proceedings, the sentences are too severe.

On the first point it is contended that the original trial was a nullity, because the Court was not properly constituted. In *Ram Krishna Reddi* v. *Emperor* (1), the trial was defective in the same manner as in the present case. The question now raised was not discussed; but it may be mentioned that an appeal against the verdict of the jury was dismissed while the appeal against the conviction of the offence triable by the Judge with assessors was allowed on the ground of illegality. But it is not necessary to decide whether the trial was a nullity, because, if it was, then only the second trial has to be considered and, in that trial, the only charge to which the accused were required to plead was the charge under section 147. If the accused thought that they were being prejudiced by the non-prosecution of the other charges (and it is difficult to see how they could have been prejudiced by a procedure which was obviously favourable to them) then they ought to have raised the objection before pleading to the charge actually laid against them. Prejudice is a question of fact; but the question was never raised and it is impossible therefore to hold now that there was any prejudice in fact. It may also be pointed out in this connection that section 235 of the Code is an enabling section and does

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not necessitate the inclusion of all the charges triable under that section in one trial [*Amiruddin* v. *Farid Sircar* (1)].

It was further contended that, when the Sessions Judge ordered a retrial, the whole case was necessarily re-opened and the charges on which the accused had been acquitted by the jury revived; and the Court ought to have been constituted as required by section 269 (*3*). In support of this contention, learned Counsel referred to the decisions in *Krishnadhan Mandal* v. *Queen Empress* (2), *Nizamuddin* v. *Emperor* (3), *Queen Empress* v. *Jabanulla* (4) and other cases in which these decisions have either been followed or referred to but which throw no independent light on the subject. The question turns on the construction of section 423 (*1*)(*b*) of the Code. Section 423 (*2*) lays down that:

> "nothing herein contained shall authorize the Court to alter or reverse the verdict of the jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the jury of the law as laid down by him."

If the first argument that the original trial was a nullity be accepted, then this sub-section will have no effect, because there is no verdict of a jury to consider. But the effect of that argument has already been discussed. For the purposes of the present argument it must be assumed that there was a verdict of the jury; and, in that case, this sub-section would be a complete bar to a retrial for the offences on which the jury had returned a verdict of not guilty. *Nizamuddin's* case (3) and *Jabanulla's* case (4) were cases of trials with assessors and, therefore, they do not assist in dealing with the present question. The only case which is really in point is *Krishnadhan Mandal's* case (2). There the trial was by jury and the conviction was set aside on the ground of misdirection and a retrial was ordered. The question after the second trial was whether a conviction in respect of an offence of which the accused had been acquitted at the previous

(1) (1882) I. L. R. 8 Cal. 481.
(2) (1895) I. L. R. 22 Cal. 877.
(3) (1913) I. L. R. 40 Cal. 163.
(4) (1896) I. L. R. 23 Cal. 975.

trial could be maintained; and it was held that in cases falling within section 236 of the Criminal Procedure Code where a retrial is ordered without any express limitation, it must be taken to mean a retrial of the whole case. But the Judges were careful to point out that in cases not falling under section 236, that is to say, where an accused person is charged at one trial with distinct offences constituted by distinct acts, a different principle would apply; and, with regard to that class of cases nothing was decided. But that is the case with which we are now concerned and in that matter there is an indication in *Krishnadhan Mandal's* case (1) that it is governed by a different principle; and that is obvious. In cases falling within section 236 there is one set of facts which may be viewed in different ways. When a retrial is ordered the whole facts are necessarily re-opened and nothing can prevent the jury from coming to any verdict that they consider right upon the facts proved before them. But where there are two different sets of facts and a verdict has been given on one set which no one impugns, then it is difficult to see why, when an appeal is brought on the other set of facts, the order for retrial should re-open both. There is certainly no authority for the proposition that a retrial necessarily opens up the whole case, at all events where a verdict of the jury is concerned. On the contrary, *Krishnadhan Mandal's* case (1) distinctly contemplates the possibility of a limited trial. In the present case it is true that the learned Sessions Judge merely ordered a retrial without any express words of limitation; but his order must be construed with reference to the scope of the proceedings before him; and all that was being dealt with was an appeal from a conviction under section 147. I would therefore hold that the order, by necessary implication, was an order for retrial of the charge under section 147 only; and I find no authority for the proposition that in a case of this nature such a limited order is bad. On the other hand it seems clearly opposed to princi-

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ple that, where there has been a verdict of a jury acquitting the prisoners of certain charges and that verdict has not been impugned by way of appeal by the Crown, the prisoners should again be put in peril for the same offences. I am therefore of opinion that the order of retrial and the trial which followed upon it were both valid in law.

On the merits of the case, learned Counsel contended that the Courts below had misconstrued the orders in certain proceedings under section 147 of the Code of Criminal Procedure and, in particular, the trial Court had erred in holding that Exhibit 9 referred to plot no. 540 which is in question in the present case and that in the judgment (Exhibit 8) it was found that there was no encroachment by the complainant in this case upon the Nullah of which plot no. 540 was a part. The order (Exhibit 9) is of no material importance; and with regard to Exhibit 8 all that the learned Assistant Sessions Judge said was that the Magistrate held that there was no encroachment on plot no. 540 so as to cause obstruction to the right of passage; and that is strictly correct.

Then it is said that the trial Court misconstrued a saneha [Exhibit 2(*a*)] which is represented as stating that a breach of the peace was apprehended. The learned Judge gives the substance of the saneha and adds that a breach of the peace was apprehended. Whether this was stated in the saneha or was his inference from the facts stated therein, is altogether immaterial.

The third point was that the evidence with regard to the existence of a room C shown in the sketch map (Exhibit 4) prepared by the head-constable has not been properly considered and, in particular, that of the Deputy Superintendent of Police. The learned Assistant Sessions Judge has given reasons for doubting the correctness of the sketch map. It is true that he has not expressly referred to the evidence of the Deputy Superintendent of Police whose signature appears on the document. But the Sessions

Judge in dealing with this part of the case has observed that the Deputy Superintendent did not check Exhibit 4 on the spot. He therefore clearly considered the evidence of the Deputy Superintendent of Police and thought that it did not establish the correctness of the sketch map.

It was next contended that the trial Court had erred in examining the Sub-Inspector of Police as a Court witness. The prosecution did not trust the Police investigation in this case. It was evidently desirable that the evidence of the investigating officer should be taken and I see no illegality in his being examined by the Court in order to give both parties an opportunity to cross-examine him.

Finally it was urged that no sufficient weight has been given to the facts that persons were injured on both sides and that this was concealed by the prosecution. The case for the prosecution was that, after the riot had taken place, the rioters in retiring had driven away some cattle. The Courts below have found that in all probability there was some scuffle in connection with this. I can see no defect in this part of the judgments; and the Courts below have given good reasons for holding that the substantive case of the defence arising out of the impounding of cattle was false. On the merits, therefore, there is no ground for this Court to interfere.

The question of sentence remains to be considered. The petitioners have been put to the expense of two trials before the Court of Sessions and two appeals and that was the direct result of a mistake in procedure committed at the original trial for which the petitioners were in no way responsible. In that view it does not seem to me proper that the same sentence that had been inflicted at the first trial should be maintained, especially as the riot, which arose out of a dispute about a passage for water, was not in itself an occurrence of any very great gravity, the accused having been acquitted of the more serious charges.

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While upholding the conviction, I would set aside the sentence of imprisonment and in lieu thereof would impose fines of Rs. 100 each upon Abdul Hamid, Syed Mohammad Nawab, and Syed Abdul Halim and of Rs. 50 each upon Pairu, Jamait, Akloo and Bhobi Kahar and in default of payment a sentence of one month's rigorous imprisonment each.

KULWANT SAHAY, J.—I agree. I, however, desire to say that I am inclined to accept the contention of the learned Counsel for the petitioners that the first trial was a nullity. Section 235 of the Criminal Procedure Code is no doubt an enabling section, and does not prevent a separate trial under section 233. But where a joint trial is held under section 235 and the accused is charged with offences some of which are triable by jury and some by the Sessions Judge with the aid of assessors, the joint trial must be held as provided by section 269(*3*), otherwise the whole trial will be illegal. In such joint trial the accused is entitled to have the opinion of all the jurors as assessors in relation to offences not triable by jury. In the case now before us the jury no doubt returned a verdict of not guilty as regards the offences triable by jury, but if they had returned a verdict of guilty and the accused had been convicted upon such verdict there would clearly have been a case of prejudice to the accused, if at the retrial, such trial was confined only to charges for offences not triable by jury. Section 269(*3*) provides for certain advantages to the accused, such as trial by jurors as assessors for offences not triable by jury and it would be manifestly illegal to deprive him of such advantages by splitting up the trial. I am therefore inclined to hold that the retrial ordered by the Sessions Judge re-opened the whole case and the accused could have been tried again for all the offences they were charged with. The first trial being illegal and without jurisdiction, section 423(*2*) would have no application, inasmuch as there would be no verdict of a jury to consider. But at the retrial it was open to the Public

Prosecutor to confine himself to some only of the charges. Section 494 no doubt lays down that the consent of the Court is first to be obtained, but the failure to obain such consent would amount to a mere irregularity and on the analogy of the principle involved in section 536(2) the second trial cannot be held to be invalid, inasmuch as no objection was taken by the accused to such trial.

Order varied.

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Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 423(1)(b), 439(4)—*conviction altered by appellate court—High Court in revision may re-alter it—Legal Practitioner, duty of.*

The petitioner having been charged and convicted of abetting an offence under section 205, Penal Code (false personation for doing any act for the purpose of a suit or prosecution), appealed to the Sessions Judge who was of opinion that upon the facts established the offence did not come within section 205/109 but within section 419 (cheating by personation) and altered the conviction to one under that section.

Held, that the petitioner had not been acquitted of the offence under section 205/109 and, therefore, that section 439(4), Code of Criminal Procedure, was not a bar to the High Court in revision from re-altering the conviction of the petitioner from one under section 419 to one under section 205/109.

* Criminal Revision no. 438 of 1926, from a decision of A. C. Davies, Esq., I.C.S., Sessions Judge of Patna, dated the 18th June, 1926, modifying a decision of Babu R. N. Sahi, Magistrate, First Class, of Patna, dated the 25th May, 1926.