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EMPEROR
v.
SHIV-
PUTRAYA.

cannot agree with that view. Unless we set aside the conviction and direct a retrial we can only enhance the sentence up to the limit which is admissible under section 323, Indian Penal Code. On a consideration of all the circumstances of the case, and specially the fact that a very serious assault was committed by the accused, we think the sentences must be enhanced to a period of one year's rigorous imprisonment in each case, in spite of the fact that the period of imprisonment directed by the Sessions Judge has already expired. The period already suffered will be taken into account when enforcing the enhanced sentences.

Sentences enhanced.

R. R.

CRIMINAL REVISION.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

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IN RE AMARSANG SHIVSANGJI^{*}.

April 2.

Criminal Procedure Code (Act V of 1898), section 145—Dispute regarding immoveable property—Magistrate can grant right of way over property in dispute.

There is no reason why a Magistrate, in proceedings initiated under section 145 of the Criminal Procedure Code, should not grant a right of way to one of the parties over the property in dispute.

Asit Mohan Ghosh v. Sarat Chandra Ghosh⁽¹⁾, not followed.

THIS was an application under criminal revisional jurisdiction against an order passed by D. D. Desai, Magistrate, First Class, at Dhandhuka.

The plaintiffs were in possession of a house-site (described as A) in a village. Amarsang and others

^{*} Criminal Application for Revision No. 57 of 1924.

⁽¹⁾ (1913) 17 C. W. N. 793.

(defendants) were in possession of an adjoining site (described as B) which was surrounded on its three other sides by houses. Amarsang and his party claimed a right of way through site A.

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The plaintiffs initiated proceedings under section 145 of the Criminal Procedure Code.

The Magistrate ordered at first that plaintiffs should remain in possession of site A, but should allow a right of way over it to the defendant. Subsequently, the attention of the Magistrate having been drawn to a case reported at 17 Calcutta Weekly Notes 793, he rescinded the order in so far as it allowed a right of way to the defendants.

The defendants applied to the High Court.

H. C. Coyajee, with *R. J. Thakor*, for the applicants.

G. N. Thakor, with *M. K. Thakor*, for the opponents.

MACLEOD, C. J.:—In this case owing to a report of August 31, 1922, from a Police Sub-Inspector, the Court was requested to take proceedings against the two opposing parties mentioned in the case under section 107, Criminal Procedure Code, in order to prevent a breach of the peace with regard to a piece of land known by the name of "Kambharwali" in the village of Adval, both parties laying claim to possession of the land. Proceedings thereafter were started under section 145, Criminal Procedure Code. The present petitioners claimed to be entitled as owners of the land marked B, in the map before us, as well as of the land marked A. The respondents disputed the petitioners' claim to A, and claimed that as being of their ownership and in their possession. No documentary evidence was recorded. The Magistrate says that there was no satisfactory evidence to prove the present possession of the land on either side, so that it would appear that the land marked A was open land not used for any particular purpose, and that

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the petitioners had been in the habit of going over it in order to get to B. The evidence showed that there was no other way to get to B except over A. The evidence further showed that there had been a partition, and it was owing to this partition that A and B had come into separate ownerships. The Magistrate then held that owing to a certain document the land A must be of the ownership of the plaintiffs, and in the absence of evidence to the contrary he decided that the opposite party, that is to say, the present petitioners, had a right of way to go to B by the entrances D and E. He then passed the following order:—

“The parties should, therefore, be informed that the plaintiffs are entitled to the possession of the land A allowing the other party to go to the land B through A by the entrances shown at D and E, until they are evicted therefrom in due course of law; that the opposite party is entitled to use the way DE until they are stopped going in due course of law and that each should stop any further disturbance until such eviction or stoppage of way (sections 145 and 146 of Criminal Procedure Code).”

Then he added a postscript that under section 145, Criminal Procedure Code, the Magistrate had no power to give pathways, etc., over a land in the possession of the opposite party owing to the case of *Asit Mohan Ghosh v. Sarat Chandra Ghosh*^(a), and directed that the plaintiffs, viz., Jiwubha and others, were entitled to possession of the land in question and should remain in possession of it until evicted therefrom in due course of law and that the opposite party should be forbidden from disturbing them until such eviction.

The result of that order was that the present petitioners were excluded entirely from their land B, and they have applied to us to exercise our revisional powers in order to restore the original order which the Magistrate had made.

It has been very strenuously argued before us that proceedings having commenced under section 145,

^(a) (1913) 17 C. W. N. 792.

Criminal Procedure Code, under which the Magistrate would have been empowered to put the present petitioners in possession of the whole of A, he had no power to make an order that they should have a right of way over a part of A which order could only be made under section 147. It appears to us that that is far too technical a view to take of the case. The Magistrate might well have altered the proceedings and elected to proceed under section 147, Criminal Procedure Code. But apart from that it seems to us that the greater includes the less, and that as the Magistrate had power to put the petitioners in possession of a certain portion of A, so as to enable them to go to B, he was also empowered to give them a lesser right, namely, to pass over that strip between D and E in order to get to their land B. We, therefore, restore the original order of the Magistrate, treating it as being made under section 147, Criminal Procedure Code.

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Rule made absolute.

R. R.

 PRIVY COUNCIL.

RUSTOM *v.* KING-EMPEROR.

J. C.*

RANDHIR SINGH *v.* KING-EMPEROR.

1923.

[Petitions for Special Leave to Appeal from the High Court of Allahabad.]

TABA SINGH *v.* KING-EMPEROR.

November 14.

KHUDA BAKSH *v.* KING-EMPEROR.

J. C.†

[Petitions for Special Leave to Appeal from the High Court of Lahore.]

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Privy Council—Criminal appeals—Practice.

February 6.

It ought to be understood very clearly in India that there is not a chance of the Judicial Committee turning itself into a mere Court of Criminal Appeal.

* *Present.*—Viscount Haldane, Lord Dunedin, Lord Carson, Sir John Edge and Sir Lawrence Jenkins.

† *Present.*—Lord Buckmaster, Lord Dunedin and Lord Atkinson.