CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

KUDRUTULLA

v.

EMPEROR.*

1912*

March 4.

Rioting—Charge—Offence—Common object—Necessity of stating the common object in the charge under ss. 143, 147 and 149 of the Penal Code—Effect of omission to state the common object—"Succeeded by another Magistrate," meaning of—Criminal Procedure Code (Act V of 1898), ss. 221, 223, 350.

An offence can be legally described by its specific name in the charge, and the question whether any further particulars are necessary under s. 223 of the Criminal Procedure Code is a question of discretion according to the circumstances of each case.

In cases of rioting the common object should be stated in the charge, but omission to state it, under ss. 143 and 147 of the Indian Penal Code, does not vitiate a conviction if there is evidence on the record to show it. It is otherwise with a charge under s. 149, Indian Penal Code, for, then, there is no specific name for the offence, and the fact that any offence is committed in prosecution of the common object is of the essence of the case, and there could be no conviction for any offence committed with a different object. It is obligatory to set out the common object in a charge under s. 149, unless it has already been specified in the main charge under s. 147.

Basiruddi v. *Queen Empress* (1) referred to.

The words "succeeded by another Magistrate" in s. 350 of the Criminal Procedure Code should not be construed in a narrow sense, but should be interpreted to mean—ceases to exercise jurisdiction in the particular enquiry or trial, and not in the particular post.

Thakur Das Manjhi v. *Namdar Mundul* (2), *Emperor* v. *Purshottam Kara* (3), referred to.

Mohesh Chandra Saha v. *Emperor* (4) and *Ali Mahomed Khan* v. *Tarak Chandra Banerji* (5) followed.

* Criminal Revision, No. 211 of 1912, against the order of Raj Krishna Banerjee, Sessions Judge of Rangpur, dated Jan. 17, 1912.

(1) (1894) I. L. R. 21 Calc. 827.
(2) (1875) 24 W. R. Cr. 12.
(3) (1902) I. L. R. 26 Bom. 418.
(4) (1908) 12 C. W. N. 416.
(5) (1908) 13 C. W. N. 420.

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Queen-Empress v. *Radhe* (1), *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (2) not followed.

THE facts are shortly these. The complainant Nasiruddin and one Ibrahim were the joint *ijaradars* of Shayampur *hât*. On the 8th of August, an up-countryman, living at the house of the accused Kudrutulla, went to the *hât* to sell lemons. The *ijaradars* took two lemons as toll from him. Kudrutulla protested against this, and there was a scuffle between Kudrutulla on the one hand and Ibrahim and the toll-collector amin on the other.

On the 12th of August, the next *hât* day, Kudrutulla came, accompanied by 15 or 20 men, armed with *lathis* and assaulted the complainant, his friends and relatives.

At 12 P.M. on the 12th of August the complainant lodged the first information. The accused were, thereupon, put upon their trial. The case came on for hearing before Babu B. N. Mukerjee, Deputy Magistrate of Rangpur, who examined the prosecution witnesses and framed charges against the accused under sections 147, 323 and 142, Indian Penal Code.

On the 18th of November 1911 the case came on again for hearing; but the Deputy Magistrate having no time to give to the case, the District Magistrate, upon the application of the defence, transferred the case to the file of Moulvi Choinuddin, another Deputy Magistrate who took up the case at the stage it was left by his predecessor.

On the 19th of November the case was adjourned for the cross-examination of prosecution witnesses and for defence.

On the 27th of November the defence filed a list of three witnesses whom they wanted to examine, but

(1) (1889) I. L. R. 12 All. 66. (2) (1906) 12 C. W. N. 140.

the Deputy Magistrate rejected the application as having been filed "too late."

On the 1st of December some witnesses were examined for the defence, and on the 4th the Deputy Magistrate convicted the accused under sections 147, 323 and 149 of the Penal Code.

Against this order the accused Kudrutulla and others appealed to the Sessions Judge of Rangpur, who dismissed their appeals. Thereupon the petitioners moved the High Court and obtained this Rule.

Mr. Donogh and *Babu Manmatha Nath Mukherjee*, for the petitioners.

No one appeared for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Rangpur to show cause why the convictions and sentences passed on the petitioners should not be set aside on three grounds.

The first ground is that the charge was defective, inasmuch as no common object was specified therein. The second ground is that there should have been a *de novo* trial, the right to it never having been waived. The third ground is that the learned Deputy Magistrate should not have rejected the accused's prayer of the 27th November for calling for three witnesses who would have proved the entire falsity of the prosecution story.

The case was a very simple and ordinary one, and though there may have been technical defects, we do not think any of the irregularities alleged have caused any prejudice to the accused persons. The complainants are joint *ijaradars* of a certain *hât*, and one of them got into an altercation and scuffle with one Kudrutulla, a lemon-seller, on the 8th August. The next *hât* day, the 12th August, Kudrutulla brought 15 or 20 men with

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him armed with bamboo *lathis* and attacked and wounded the complainant and his friends and relations.

As regards the defect in the charge the law is clear, that as regards the offence of rioting the offence can be legally described by its specific name, and the question whether any further particulars are necessary under section 223 of the Criminal Procedure Code must be a question of discretion according to the circumstances of each case.

It has been laid down in numerous rulings of this Court that in cases of rioting the common object should be stated in the charge [*Basiraddi* v. *Queen-Empress* (1)], but the omission to state it under sections 143 and 147 does not vitiate a conviction if there is evidence on the record to show it.

In this case the common object was obvious from the charge sheet and the evidence, and it has been found to be that the accused Kudrutulla, his cousin and his neighbours combined together and formed an unlawful assembly to assault the complainant and his men. We think, as a matter of law, it is otherwise with a charge under section 149 of the Penal Code. Then there is no specific name for the offence, and the fact that any offence is committed, in prosecution of the common object, is of the essence of the case and there could be no conviction for any offence committed with a different common object. It is therefore in our opinion obligatory to set out the common object in a charge under section 149, unless it has been already specified in the main charge under section 147.

We therefore make the rule absolute so far as the convictions under sections 149 and 323 are concerned, and set them aside together with concurrent sentences passed thereunder. And in any case the common object being clearly to assault with *lathis* and to cause

(1) (1894) I. L. R. 21 Calc. 827.

hurt, there could not be separate sentences for what is practically one offence. As regards the second point we are confronted with what appears to be a conflict of rulings. In the case of *Queen-Empress* v. *Radhe* (1), it was held that this section was intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular post and that officer ceases to exercise jurisdiction in that post and is succeeded by another officer. This clearly goes beyond the law as laid down in section 350, the words being " ceases to exercise jurisdiction therein," that is, in the enquiry or trial, and not, as the Allahabad ruling would imply, in a particular post. The words " succeeded by another Magistrate " have however been read as importing that the first Magistrate must have left his post, but it has been held in two rulings of this Court [*Mohesh Saha* (2) and *Ali Mahomed Khan* (3)] that the word " succeeded " should not be construed in the narrower sense.

No doubt such a narrow construction was incidentally put upon it by a Bench of this Court in the case of *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (4) to which one of us was a party, but the question did not directly arise in that case and the facts clearly show that the irregularity in that case caused prejudice to the accused person. On a consideration of these cases we are of opinion that the later rulings are direct authority on this particular point and are binding on us. We do not therefore consider it necessary to refer the point of law to a Full Bench.

The facts of this case entirely remove the matter from any question of prejudice. It appears that learned counsel was brought down from Calcutta for

(1) (1889) I. L. R. 12 All 66.
(2) (1908) 12 C. W. N. 416.
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the express purpose of cross-examining certain prosecution witnesses. He had only that day and the next at his disposal, and the trying Magistrate was unable to take up that case on those days. He therefore applied to the District Magistrate to allow the case to be heard before another Magistrate, waiving the right to a *de novo* trial. Had the Magistrate who succeeded to the jurisdiction felt himself obliged to reopen the case from the beginning, the object of the accused in bringing down counsel and asking for the transfer would have been frustrated. It is argued that the transfer was under section 528, and that section 350 has no application, but we think that this is now concluded by the authorities we have cited. The District Magistrate did not apparently withdraw the case to his own file. He accepted the position that Babu Bhujendra Nath Mukerjee had ceased to exercise jurisdiction in the case by reason of his being occupied in some other work, and appointed another Magistrate to take charge of the case. The leading case of *Thakur Das Manjhi* v. *Namdar Mundul* (1), in which it was held that it must be shown that the accused person has been prejudiced by the order of the succeeding Magistrate acting on evidence entirely recorded by his predecessor has never, as far as we know, been overruled. Here the entire case for the defence, including the cross-examination of prosecution witnesses, was held before the second Magistrate, and the defence was therefore placed in a far more favourable position by reason of the case being unavoidably heard in its later stages by the second Magistrate.

We find that the second ground upon which the Rule was issued fails. As to the third ground we find that a petition was put in to summon three witnesses,

(1) (1875) 24 W. R. Cr. 12.

two of whom were railway servants, three days before the date fixed for final hearing. These witnesses were to prove that the first information was not given to the Sub-Inspector in the Railway station at midnight on Saturday, but was drawn up after consultation with a mukhtear named Nasiruddin at midday on Sunday.

Now it is fully established that the Sub-Inspector saw the wounded men and recorded evidence on Saturday afternoon and evening. Even, therefore, if the formal first information report was not drawn up till Sunday, there would be nothing against the case for the prosecution. Information had been given to the Police on Saturday afternoon, and they had acted on it. The Sub-Inspector says that he recorded it in a private room in the station which was locked and where no Railway official was present. The witnesses on the first point, therefore, could only speak to a negative which would not under the circumstances be of much value. As regards the second point, the Sub-Inspector freely admitted that he spent the night at the house of Nasiruddin mukhtear and discussed the case with him. The defence therefore had in its hand all that it required to make the point now taken. It was taken before the learned Judge in appeal and fully dealt with by him. As regards the mandatory provisions of section 257 of the Criminal Procedure Code, on which much stress is laid before us, we are of opinion that the recording on the petition "Too late" amounts to a refusal of the application on the ground of delay, and in this case it is clear that the Magistrate was fully justified in considering that the application which ought to have been made long before, certainly not later than 19th November, was made for the purpose of delay.

The case had been dragging on since the 6th September, the occurrence having been on the 12th August.

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It was a petty case which should have been disposed of in two short sittings, and the attitude of the defence throughout has clearly not been that of persons desirous of expediting the course of justice.

The question of the recording of the first information was fully known to the accused from the first. It was raised for the first time on the 1st December in cross-examination of the Sub-Inspector, and this although all three accused had had an opportunity of making a statement in their defence on the 18th October and had not hinted at such a defence. They then said they would file a written statement, but do not appear to have done so. Even if the Magistrate had not recorded his reasons for refusing the application, we should have felt very disinclined to interfere in revision, as the fact that the application was made for the purpose of delay is clear from the record and the order sheet, and the evidence was unnecessary and unavailing.

But under the circumstances we think the Magistrate's reasons, though irregularly recorded, are a sufficient compliance with section 257, Criminal Procedure Code; and while we have no desire to minimize the importance of a strict compliance with that section, as laid down in the case of *Emperor* v. *Purshottam Kara* (1), we do not think that any rule of law should be wrested to defeat the ends of justice, and in the exercise of our discretionary powers in revision we think this is a case where substantial justice has been done, and there is no need for our interference.

The Rule is discharged. The petitioners will surrender to their bail and serve out the rest of their sentences.

S. K. B. *Rule discharged.*

(1) (1902) I. L. R. 26 Bom. 418.