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difficulty raised in *Krishna Dhan Mandal v. Queen-Empress* (1) by use of our revisional powers, we should have had no hesitation in using them. But the setting aside of a finding of the Sessions Court under section 423 enables this Court to order a re-trial, and it is now settled law that that order re-opens the whole case.

The conviction and sentence under section 147 is set aside, and a re-trial ordered on the original charges before the learned Sessions Judge of Backerganj who will approach the case with an open mind.

*Conviction set aside ;
 re-trial directed.*

S. K. B.

(1) (1894) I. L. R. 22 Cal. 377.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Imam.

1912
 June 28.

SITA AHIR

v.

EMPEROR.*

Charge—Omission to frame charge—Rioting—Causing hurt—Conviction for an offence other than the one charged with—Error of law—“Error omission or irregularity”—Criminal Procedure Code (V of 1898), ss. 535, 537(a)—Practice.

Sections 535 and 537(a) of the Criminal Procedure do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with. Section 233 is mandatory ; for every distinct offence of which any person is accused there

* Criminal Revision, No. 786 of 1912, against the order of H. E. Spry, Joint Magistrate of Shahabad, dated March 19, 1912.

shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in ss. 234, 235, 236 and 239 of the Code.

Section 236 refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute.

To convict an accused of murder on a charge of rioting or to commit him to the Sessions without framing a charge would be *not* merely an irregularity but an error of law vitiating the trial.

THE petitioners, Sita Ahir and others, were charged with committing riot on the 8th of July 1911 with the common object of voluntarily causing hurt to the complainant and dispossessing him of his field. The case was tried by the Sub-Deputy Magistrate of Buxar, who convicted them under section 147 of the Indian Penal Code and sentenced them to six months' rigorous imprisonment. Against this order of the Sub-Deputy Magistrate the petitioners appealed to the Joint Magistrate of Buxar, who held that the complainant on the day of occurrence was not in possession of the field which he claimed as his, and therefore he had no right to unyoke the ploughs of the petitioners when engaged in ploughing the field. Accepting the right of private defence, the learned Joint-Magistrate acquitted the petitioners of the charge under section 147 of the Indian Penal Code. He, however, convicted them under section 323 of the Indian Penal Code for assault upon one Ramsarup, one witness for the prosecution, and sentenced them to six months' rigorous imprisonment, on the ground that Ramsarup, having no connection with the disputed field, the attack on him was totally unwarranted.

The petitioners thereupon moved the High Court and obtained this Rule.

Babu Manmatha Nath Mukherjee, for the petitioners.

No one appeared for the Crown.

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HOLMWOOD AND IMAM JJ. We are of opinion that this Rule must be made absolute on the ground on which it was issued.

The petitioners were charged with rioting under section 147 with the common object of causing hurt to the complainant and with other objects with which we are not concerned. They have been convicted of causing hurt to another person, and the learned Magistrate in his explanation maintains that on the finding that the injuries caused to the complainant were covered by the right of private defence of property, but that the injuries caused to Ramsarup were not so covered, the Magistrate was justified in convicting the accused under section 323 and sentencing them to undergo six months' rigorous imprisonment each. He says that the omission to frame a charge is immaterial, because there was no prejudice, inasmuch as evidence was produced on both sides as to the responsibility for the injuries caused to Ramsarup, and had a charge under section 323 been framed, the matter could not have been more fully investigated, and it cannot be said that the accused have been in any way prejudiced in their defence or misled as to the nature of the charge against them. Had such a charge been framed, or were the case now remanded for re-trial, it would have to be decided on precisely the same evidence as has already been recorded.

Now, admitting all that the Magistrate puts forward, it is clear that under the law this conviction is not merely irregular but illegal. Section 233 is mandatory; for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in sections 234, 235, 236 and 239. We presume, that the Magistrate relies upon section 535 as covering this case. That section says that no finding

or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless in the opinion of the Court of appeal or revision a failure of justice has in fact been occasioned thereby. Now "merely on the ground that no charge was framed" must in our opinion mean a case where the offence being a petty one and the evidence being fairly taken, the Court framed no charge at all. But where the Court has framed a charge, then it cannot be said that the conviction is invalid merely on the ground that no charge was framed. We cannot deal with this case under that section. A charge was framed, and that charge has distinctly included the causing of hurt to the complainant, and the accused has been convicted of a totally different matter which was not charged at all. Then it cannot either come under section 537 (a) "any error or omission or irregularity in the charge." It is clear that the accused could raise no objection, as he could have had no idea that he is going to be tried upon this particular charge, there being a specific charge against him. It is not an omission in the charge which has been framed; it is the total omission to frame a charge upon the offence for which he has been convicted. Then section 232 does not help him, that is "if any appellate Court or the High Court in the exercise of its powers of revision is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit."

Now, it is impossible for us to say that the accused have not been prejudiced. Supposing in the course of a trial for rioting, as we have before pointed out, the evidence shows that murder has been committed, can it be said that the accused can be convicted of murder

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by the Magistrate on the charge of rioting, or that he can be committed to the Sessions without any charge being framed. The matter is not an irregularity but an error of law which vitiates the trial.

Then we come to section 237 which deals with a case where 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. But this does not apply, because section 236 only refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. Now, here there was no doubt whatever about what was charged, nor on the evidence, as the Magistrate says, about hurt being caused to Ramsarup. That was not the question whether the man should be convicted of causing hurt to Ramsarup. The conviction of rioting and causing hurt to another man are questions totally different and independent, and the trial should also have been on a distinct and separate charge.

We see that the Magistrate has fallen into another error by not framing a charge, for the medical report shows that Ramsarup had both bones of his legs fractured which is ofcourse a case of grievous hurt.

The conviction and sentence must be set aside, and a re-trial ordered on a charge properly framed under section 325 or 323 of the Indian Penal Code. The petitioners meanwhile will remain on the same bail.

S. K. B.

Re-trial ordered.