APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Imam.

NAZIMUDDIN

v.

EMPEROR.*

1912

June 17.

Assessors, examination of—Re-trial—Criminal Procedure Code (Act V of 1898), ss. 309, 403, 423, 439—Assessors not to be questioned until their opinions delivered and recorded—Rioting—Right of private defence—Practice.

Section 309 of the Code of Criminal Procedure gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions.

When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed, and having regard to the provisions of section 423 of the Code of Criminal Procedure, the provisions of section 403 in that respect cannot apply.

Krishna Dhan Mandal v. *Queen-Empress* (1) and *Queen-Empress* v. *Jabanulla* (2) referred to.

THE facts are shortly these. About eight years ago one Amzad Hawaldar married the widow of Azimuddin, brother of accused Nazimuddin.

Azimuddin had died leaving him surviving his widow, two sons and three daughters. Both the sons were minors—one of them was living with Amzad, his stepfather and the other with his uncle Nazimuddin, the appellant.

* Criminal appeal, No. 225 of 1912, against the order of R. Garlick, Additional Sessions Judge of Backarganj, dated March 8th, 1912.

(1) (1894) I. L. R. 22 Calc. 377. (2) (1896) I. L. R. 23 Calc. 975.

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According to Amzad the two brothers were separate and the disputed plot of land—the cause of the fatal riot—was in the exclusive possession of the deceased Azimuddin. But Amzad admitted that though the disputed plot of land was in the exclusive possession of Azimuddin, it was not made over to him by Nazimuddin until only about a year ago, when it was done so for the maintenance of the minor in his charge. The story therefore was that Amzad had grown crop on it and when he had gone to reap it with the help of his labourers on the day of the occurrence, the accused Nazimuddin came with a large number of men and attacked them.

The accused claimed the right of private defence, contending that he was in possession of the disputed plot of land and that Amzad was an aggressor, and that what he did, he did in self-defence.

The accused was committed to the Sessions under sections 148 and 304 of the Indian Penal Code. The Additional Sessions Judge of Backerganj, disagreeing with both the assessors as to the innocence of the accused, though agreeing with their findings of facts, sentenced the accused Nazimuddin to 2 years' rigorous imprisonment under section 147 of the Penal Code. Against this conviction the accused appealed to the High Court.

Mr. Arthur Caspersz and *Babu Raiendra Chandra Guha*, for the appellant.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Cur. adv. vult.

HOLMWOOD AND IMAM JJ. This is an appeal from the conviction and sentence passed by the learned Additional Sessions Judge of Backerganj upon one Nazimuddin. The Judge, disagreeing with both the

assessors as to the innocence of the accused, though he says he agrees with their findings of fact, has sentenced the appellant Nazimuddin to 2 years rigorous imprisonment under section 147 of the Indian Penal Code.

The trial appears to us to be altogether vitiated by the fact that the assessors were not asked and apparently not allowed to give an independent opinion on the case.

We have pointed out to this learned Judge before, and we must do so again, that his method of cross-examining the assessors is entirely contrary to law, and results in grave miscarriage of justice. The law (section 309 of the Code of Criminal Procedure) gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions.

If there is anything obscure in their verdict, there is no objection to the Judge asking questions to clear up such obscurity but he is bound to allow the assessors to express their own opinions independently in their own words on the whole case before interfering with them in any way or asking them any question whatever except what is your opinion. We never get a verdict on the facts from assessors who sit with this learned Judge and we are always greatly embarrassed in appeal by his erroneous practice.

But in this case the conviction cannot stand on the face of the judgment. The findings are throughout contradictory, and it is difficult to understand what the Judge meant to hold; but when he did find that the accused had the right of private defence in any case, he could not convict them or any of them of rioting. It is impossible that a man who is acting in the exercise of a legal right can be a member of an unlawful

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assembly. Any person who exceeds the right of private defence is liable to be punished for the specific offence of culpable homicide or other crime which he may be found to have committed in excess of the right.

The conviction under section 147 is therefore, on the findings of the Judge, untenable and must be set aside. But we think there must be a re-trial in this case, since the conclusion that the accused had the right of private defence is erroneous on the Judge's own findings. He nowhere finds that the complainant had no *bonâ fide* claim to the paddy he was carrying away. He finds indeed to the contrary, that the complainant as guardian of his step-son, who was the rightful owner of the land left by his father, had been getting land for the boy's maintenance, and that lately owing to a quarrel the accused had arbitrarily denied his rights. He finds that complainant married the boy's mother 8 or 9 years before, and there had been no dispute hitherto, and therefore there must have been an amicable arrangement, which has recently broken down. But this does not make complainant a thief or a trespasser, and there is no right of private defence against a person asserting a *bonâ fide* right. Then again he finds that the assault did not take place in the field, but outside Afiluddi's house where the complainant says it did, and that the attack was on the back of two defenceless laden coolies who were not committing any offence. He also seems convinced that it is quite likely that Nazimuddin struck the blow which killed Yakub Ali, but he says that the evidence is entirely that of the complainant and his men. Of course it is; the evidence for the prosecution must be used to prove the prosecution case. Independent persons are not likely to turn up in cases of this kind. He says people living

near should have been examined, but there is no allegation that any of them saw the occurrence. He does not say he has any reason to disbelieve the complainant and his witnesses. These are only a few examples of contradictory and inconsistent findings which we cannot further enlarge upon for fear of prejudicing the case on re-trial.

When a conviction is set aside and a re-trial ordered it is settled law that the whole case is re-opened and the accused must be tried again on all the charges originally framed; and having regard to the provisions of section 423 of the Criminal Procedure Code, the provisions of section 403 in that respect cannot apply: *Krishna Dhan Mandal* v. *Queen-Empress* (1). We might, following the rule in *Queen-Empress* v. *Jabanulla* (2), alter the findings ourselves but in that case we should be precluded from interfering with the sentence; and, as pointed out by Banerjee J., this is not one of those cases where such an alteration could be made, inasmuch as the accused has been acquitted of the major charge and convicted on a very minor one. He can only be dealt with on the major charge by directing a re-trial which opens the whole case and places it upon the same footing as if there had been no previous trial at all.

We do not think it necessary to refer to our powers in revision under section 439, which we could exercise independently without any reference to section 417 which is a purely enabling section giving the Local-Government certain powers, and by implication taking them away from private parties, but not in any way touching the jurisdiction or revisional powers of this Court in all matters connected with criminal trials whether there has been a conviction or an acquittal. Had it been necessary to get over the

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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 Calc. 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.