

Lala and ors. Vs. Emperor

Lala and ors. Vs. Emperor

SooperKanoon Citation : sooperkanoon.com/479964

Court : Allahabad

Decided On : Aug-25-1933

Reported in : AIR1933All941

Appellant : Lala and ors.

Respondent : Emperor

Judgement :

ORDER

1. This case was referred to a Bench of two Judges by one of us in view of certain important questions of law that arise in it. In order to appreciate those questions it is necessary to state a few facts.

2. It appears that information was received by the Police authorities that one Kuddu was concealing himself in a certain village at Jaunpur, and in order to effect his arrest a head constable Safdar Husain with three constables proceeded to the village. The Sub-Inspector was absent from the thana at that moment, and when he came to know that a police party had proceeded to arrest Kuddu he also went in the same direction. He met the raiding party in the way as they were coming back after having arrested Kuddu, but they informed the Sub-Inspector that certain other undesirable persons were also in the village. He, therefore, proceeded to investigate the matter and was going towards the house of Ahibaran. When he was at a short distance from the house he saw that Sobha and Raghunath were attacking Ahibaran with a spear and a lathi. The reason of this attack presumably

was that it was Ahibaran who had informed the police about the whereabouts of Kuddu. On seeing the Sub-Inspector Sobha and Raghunath took to their heels. They were pursued and Sobha was ultimately arrested. He, however, raised an alarm and called for help. Upon this the three applicants before us along with others arrived at the scene and assaulted the Sub-Inspector and caused him injuries. While the Sub-Inspector was being beaten Sobha released him-self and fled away.

3. Upon these facts, the three applicants before us along with two others were after a Magisterial enquiry committed to the Court of Session and they were tried by the Assistant Sessions Judge under Sections 333, 225, 323, 325 and 147, I.P.C. The charge under Section 147, I.P.C, was triable with the aid of assessors whereas the other charges were triable with the help of jurors. The same set of persons acted as assessors as well as jurors. On the 13th November 1930 the jurors returned a unanimous verdict of not guilty, but they as assessors were of the opinion that the three applicants before us were present at the time of the assault and were thus guilty of rioting. They expressed some doubts about the presence of the two other persons who were tried along with the three applicants. The learned assistant Sessions Judge was of the opinion that as only three persons were proved to have taken part in rioting the charge under Section 147, I.P.C, could not be maintained and he, therefore, acquitted the present applicants under Section 147, I.P.C. It is not necessary for us to express an opinion upon this view of the law taken by the Assistant Sessions Judge and we only mention this fact as showing that the accused were acquitted of the offence under Section 147, I.P.C. As the assessors who were also jurors thought that the three applicants before us were guilty of rioting the learned Assistant Sessions Judge was of the opinion that the jurors were somewhat inconsistent in having acquitted the accused under Sections 323 and 325, I.P.C, and he, therefore, asked the jurors to retire and reconsider their verdict on these two charges. Upon reconsideration the jurors returned a unanimous verdict of guilty under Sections 323 and 325, I.P.C, against the three applicants before us. The Assistant Sessions Judge agreeing with this verdict of the jury convicted them of these two charges and sentenced them to 1 year's R.I., under Section 323, I.P.C, and 3 year's R.I., under Section 325, I.P.C, and acquitted them of the charges under Sections 333 and 225, I.P.C.

4. The three accused appealed against their convictions under Sections 323 and 325, I.P.C, and on the 16th of January 1931, the learned Sessions Judge ordered a retrial. It may be mentioned that the Local Government were apparently in no way dissatisfied with the acquittals under Sections 333, 225 and 147, I.P.C, and no Government appeal was filed. It may also be mentioned that while ordering a retrial the learned Sessions Judge was of the opinion that the only irregularity committed by the trial Court was that the Assistant Sessions Judge had asked the jury to reconsider their verdict of 'not guilty' in respect of offences under Sections 323 and 325, I.P.C, because the only case in which a jury may legally amend its verdict is when by accident or mistake a wrong verdict is delivered (Section 304, Cr.P.C.), and the amendment must be made before or immediately after the verdict is recorded. There was no finding by the Sessions Judge that there was any misdirection in the charge by the trial Court before the jury gave their original unanimous verdict of 'not guilty'. The accused filed an application in revision in the High Court against the order of retrial, but that revision was dismissed on the 9th of March 1931 by a Bench of this Court, in the absence of counsel but upon a consideration of the merits of the case. As learned Counsel thought that his application in revision was dismissed in default he submitted another revision petition, but that also was dismissed by the High Court on the 24th of February 1932 on the ground that the dismissal of a former petition acted as a bar to a consideration of the second petition when the first one was-dismissed on the merits. The Assistant Sessions Judge, when the case went back to him, framed charges under Sections 333 and 225, I.P.C., and convicted the accused of- those offences and sentenced them to 4 years R.I., and a fine of Rs. 100, under Section 333, I.P.C., and 1 year's R.I., under Section 225, I.P.C. The Sessions-Judge on appeal maintained the convictions and sentences.

5. In revision four points have been taken before us, (1) that the conviction should be set aside because there-was a misdirection in the charge to the-jury, (2) that there was an improper reception of evidence and as such the trial was vitiated; (3) that there was a defective constitution of the jury and as such the trial was a nullity and (4) that the Assistant Sessions Judge contravened the provisions of law contained in Section 403, Cr.P.C.

6. As regards the first point, namely, that there was a misdirection in the charge to the jury we have come to the conclusion that there is no substance in it. It is contended that the learned Assistant Sessions Judge said that certain witnesses corroborated the prosecution story and at other places he said that certain witnesses supported the prosecution story, and this is wrong inasmuch as it is not the function of the Judge while charging the jury to say that the prosecution story is proved by the prosecution witnesses but that this matter should be left entirely to the jury. We are of the opinion that when the learned Judge says that witnesses corroborate and support each other he does not mean to say that those witnesses should necessarily be believed. All that he says is that the prosecution story is corroborated or supported by certain prosecution witnesses and in doing so. he is merely reminding the jury of facts that are recorded in the case. Indeed he has specifically said in the charge to the jury that they have to consider how far the evidence is reliable or not. It is then argued that although the Assistant Sessions Judge has pointed out certain discrepancies and contradictions in the statements of the prosecution witnesses, he has also said that these contradictions are liable to be explained and reconciled, it is suggested that he should not have said so. Here again the learned Judge has later on said that it is for the jury to consider how far these contradictions materially affect the broad aspects of the evidence. Moreover under Section 298(2) Cr.P.C., the Judge may, if he thinks proper in the course of his summing up, express to the jury his opinion upon any question of fact.

7. The second contention is that the Judge admitted in evidence the statements of Kauleshar and Ahibaran recorded in the former trial. The learned Assistant Sessions Judge did so under the provisions of Section 33 of the Evidence Act. The learned Sessions Judge in appeal pointed out that it was proved that these two witnesses had gone to Calcutta and attempts to get them from there had proved unsuccessful, and it was clear that it would have occasioned too much expense and delay to go on making such attempts any longer. Upon this expression of opinion by the appellate Court we find that there is no force in this contention.

8. The third contention is that the jury was not properly constituted and therefore the trial was a nullity. The facts relevant to this contention are that at the time of

retrial summonses were issued for seven jurors, and it is argued that this is wrong in view of the provisions of Section 326, Cr.P.C., which says that the Sessions Judge shall ordinarily send a letter to the District Magistrate requesting him to summon as many persons as seem to the Sessions Judge to be needed for trials by jury, the number to be summoned not being less than double the number required for any such trial. Such number before the Court of session not being less than five under Section 274, Cr.P.C., it is contended that the learned Sessions Judge should have sent a letter to the District Magistrate requesting him to summon at least ten persons named in the list of jurors, and then the result of his not doing so was that there was a defect in the constitution, of the jury. It is said that the underlying principle in a trial by jury is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular accused, and that an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided in the Code to secure perfect impartiality. We might concede the existence of the principle, but we do not think that it has in any way been violated in the present case, nor do we think that the provisions in Section 326, Cr.P.C., lay down such an imperative rule of procedure that its partial neglect cannot be cured by Section 537, Cr.P.C. Reliance is placed on behalf of the applicants on the view entertained by the Calcutta High Court in *Brojendra Lal v. Emperor* (1908) 7 CWN 188 and *Sirajul Islam v. Emperor* : AIR1928 Cal645 . Those cases do to a certain extent support the contention of the applicants, but the guiding factor in those cases seems to be that where by reason of a failure to observe the standard set down in S- 326, Cr.P.C., it so happens whether from non-attendance of jurymen or otherwise that the requisite number of jurors cannot be empanelled for the trial of an accused person, the Sessions Judge will not be justified in proceeding with the trial because prejudice to the accused might be said to have been caused. Now if we look carefully at the wording of Section 326, Cr.P.C., we will find that it is expressed somewhat loosely. It begins by saying that the Sessions Judge shall ordinarily seven days at least before the day which he may from time to time fix for holding the sessions etc., etc. This fixes a minimum in spite of the word 'ordinarily', but the minimum fixed is governed by the word 'ordinarily'. Then the section says that the number to be summoned is not to be less than double the number required for any such trial.

The requirement as to the number to be summoned is also a minimum, and according to the strict rules of grammar that minimum too is part of a statement of what the Sessions Judge shall ordinarily do. It may also be mentioned that the section provides for the summoning of jurors not for a particular trial but for all such trials as may be fixed for a particular sessions period. That this is so is made clear by the provisions of Section 327, Cr.P.C., which says that

the Court of Sessions may direct jurors or assessors to be summoned at other periods than the period specified in Section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole Session oppressive, or whenever for other reasons such direction is found to be necessary.

9. We are, therefore of the opinion that in these Provinces, where the practice generally seems to be to summon one set of jurors for one trial and another set of jurors for another trial, the word 'ordinarily' should have some significance, and in spite of the use of the word 'shall' the direction laid down therein is not necessarily mandatory. It does not follow that the use of the word ordinarily entitles a Judge in a particular case to ignore the section altogether. But we are of the opinion that if the provision is inadvertently violated Section 537, Cr.P.C., will cure the defect. In *Subramanya Aiyar v. Emperor* (1902) 25 Mad 61, the Judicial Committee pointed out that though in a sense the merest irregularity may be illegal it does not follow that all illegalities are within the scope of Section 537, Cr.P.C. But their Lordships do not say or suggest that nothing could be cured under the section if it is illegal. In *V.M. Abdul Rahman v. Emperor*. Their Lordships of the Privy Council held that non-compliance with the strict provisions of Section 360, Criminal P.C., which makes it imperative that the depositions of witnesses should be read over and explained to them in the presence of the accused or his pleader amounted to an irregularity which was cured by Section 537 of the Code. The Code is a long list of imperative provisions, some of which have references to matters which are in no way vital and to avoid the embarrassments that might arise from comparatively trivial negligence or oversight, are directed to mere incidents of procedure, and Section 537, Cr.P.C., provides that in the absence of prejudice to the accused an error, omission or irregularity in proceedings before or during trial may be cured.

Under Clause (c) it goes so far as to say that an 'omission to revise any list of jurors or assessors in accordance with Section 324, Cr.P.C., will be cured, and it follows therefore that if a defect which would prima facie entitle the accused to challenge the array of jurors could be cured, the irregularity of summoning not less than double the number of of jurors required for a particular trial may also be cured, provided it does not occasion any failure of justice. A Full Bench of this Court in Kapoor Chand v. Sarju Prasad : AIR1933 All264 , has held while interpreting Section 537 Cr.P.C., that the sole criterion laid down there is whether the accused person has been prejudiced or not. They say:

The object of procedure is to enable the Court to do justice, but if in spite of even a total disregard of the rules of procedure justice has been done there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong.

10. The view of the Calcutta High Court mentioned in the earlier cases has to a great extent been modified by a Full Bench decision of the same Court by five Judges reported in : AIR1930 Cal212 , Emperor v. Er-man Ali in which their Lordships held that in a murder case where the number of jurors summoned was fourteen (instead of 18) nine of whom appeared and were chosen by lot, the trial was not bad by reason of that fact that only fourteen jurors had been summoned in contravention of the provisions of Section 274 and 326, Cr.P.C. A mere neglect, therefore, of the strict provisions of Section 326, Cr.P.C., such as has taken place in the present case, does not in our view make the constitution of the jury illegal and render the trial a nullity. The next defect that has been pointed out is that in response to the summons only two jurors attended, and upon that three persons were chosen from the persons that were present in Court, and a jury of five was formed. From the proceedings of the Court it does not appear that any objection was taken to any of these five under Section 277 Cr.P.C., but what is argued is that the provisions of Section 276, Cr.P.C., were not complied with. It is contended that upon a correct interpretation of the second proviso to Section 276, Cr.P.C., there was a deficiency of eight inasmuch as two actually appeared when summons ought to have issued to ten, or at least five inasmuch as seven were summoned and therefore eight more or at least five more should have been

chosen from the persons present, and the choice from these eight or five should have been made by lot. This contention has compelled us to interpret Section 276, Cr.P.C., and the succeeding two or three sections of the Cr.P.C., and to indicate their true scope. We wish to point out in the first place that the scheme of these provisions seems to be that Section 276, Cr.P.C., with all its provisions, is a general section dealing with the general nature of the procedure, and the details of that procedure are to be worked out with reference to Sections 277 to 279, Cr.P.C. These sections must be read together as prescribing one continuous procedure for the empanelling of juries according to circumstances. Here again we wish to make it clear that when a deficiency arises it is the duty of the Judge to consider whether he will postpone the trial or make up the deficiency according to law. The words 'with the leave of the Court' in the second proviso to Section 276, Cr.P.C., make this quite clear.

11. This is a convenient stage at which we should point out that there is no provision in the Code by which the Court is to ascertain beforehand how many of the persons summoned to serve as jurors have attended, and thus to determine the deficiency which has to be supplied. Section 331, Cr.P.C., contemplates a subsequent stage altogether. That may be practice but if such a practice has grown up it is not authorised by law and should be discontinued. No doubt if persons summoned as jurors do not attend they are liable to be fined; but the stage at which it should be ascertained whether they have attended or not is not reached until their names are called out for the purpose of empanelling a jury. The Code of 1861 said that the jury shall be chosen by lot from persona attending in obedience to the summons. The present Code says that the jurors shall be chosen by lot from the persons summoned. This alteration seems to suggest that an informal tally of the persons present upon summons beforehand was specially discountenanced and for obvious reason. Many a jurymen has appeared in the nick of time and it is possible to conceive that a jurymen although he has attended in obedience to the summons might be taken suddenly ill after the informal tally and before his name is actually called out under Section 277, Cr.P.C. The proper procedure, therefore, is that the names of the persons summoned irrespective of whether they have attended or not should be put into the ballot box and then as each name is drawn out from the box it should be called aloud under Section 277,

Cr.P.C., and the accused asked if he objects to be tried by that juror. Objection may then be taken to such juror by the accused or by the prosecutor and the grounds should be stated. These objections have to be decided by the Sessions Judge whose decision under Section 279, Clause (1), Cr.P.C., shall be final. After every name has been called out and objections, if any, have been decided, it is the duty of the Judge when an objection has been allowed to supply the place of such juror under the provisions of Section 279 (2), Cr.P.C. Then, after challenges are made and allowed and the place of the challenged jurors supplied under Section 279 (1), Cr.P.C., it will be known whether there is a deficiency as mentioned in the second proviso to Section 276, Cr.P.C., and it is only by this method that the Code provides for the deficiency to be discovered and not by any ascertainment beforehand. This was the view taken by a Full Bench of the Calcutta High Court in *Kedar Nath Mahato v. Emperor* : AIR1928 Cal83 . As stated earlier Sections 276 to 279 Cr.P.C., provide for a continuous procedure and we have indicated what this procedure is.

12. The next thing that has to be determined is the quantity of the deficiency. It is argued on behalf of the applicants that the words 'deficiency of persons summoned' means 'deficiency of persons summoned for the purpose of making up the minimum number of tens among whom lots are to be drawn', and reliance is placed on the case of *Roshan Ali v. Emperor* : AIR1927 Cal787 , and *Bhola Nath Hazra v. Emperor* : AIR1927 Cal242 . These cases undoubtedly support the contention advanced on behalf of the applicants, but they have been dissented from by the two Full Benches of the Calcutta High Court, *Kedar Nath Mahato v. Emperor* : AIR1928 Cal83 and *Emperor v. Panchu Shaikh* : AIR1931 Cal178 . We are of the opinion that the deficiency refers to the number required to form the quorum. The argument advanced on behalf of the applicants leads to the conclusion that the word 'jurors' in the proviso refers to potential jurors, or as they are termed in the first part of the section to 'persons summoned to act as such'. It is true that so far as it is a question of pure terminology, Sections 327 and 328, Cr.P.C., and it may be others, refer to jurors when what is meant is persons-directed to attend for service as jurors, but there is no logical reason for the use of the word 'jurors' and the use of the word 'persons summoned' within the compass of one section in close juxtaposition for the purpose of indicating the same set of

persons. We are, therefore, of the opinion that the word jurors in the second proviso means actual jurors and not potential jurors and the number of jurors required, therefore, means the number required to make up the quorum under Section 274, Cr.P.C., In the present case three were required to make up the quorum and three were chosen with the leave of the Court from the persons present in Court. We have assumed that in order to find out the deficiency the correct procedure as indicated by us was followed, and in the absence of anything on the record of the present case showing that a different procedure was followed we shall not be justified in assuming that an irregularity took place. Our view is fully supported by the two Full Bench decisions of the Calcutta High Court, namely, the cases of Kedar Nath v. Emperor : AIR1928 Cal83 , Emperor v. Erman Ali : AIR1930 Cal212 and Emperor v. Panchu Shaikh : AIR1931 Cal178 .

13. It is next contended that the word 'chosen' in the second proviso to Section 276, Cr.P.C., means 'chosen by lot' and reliance is again placed on Roshan Ali's case : AIR1927 Cal787 . Once again we find it difficult to believe that whereas the Legislature said 'chosen by lot' in the beginning of Section 276, Cr.P.C., it simply said 'chosen' in the second proviso when as a matter of fact here again the intention was a choice by lottery. It may be argued that this perhaps is not a conclusive reply if all that can be said is that where choice by lottery is intended it is specifically so mentioned, but if 'chosen' in the second proviso means 'chosen by lot' then it would follow as a natural consequence that the names of all the bystanders that might be present in Court will have to be put into the ballot box, and this is obviously not what is meant and would lead to disastrous result, for it could be proved that the name of a particular bystander was not put into the ballot box and there might be large number of such bystanders, the accused would argue that the lottery was defective and that the names of all persons present in Court should have been put into the ballot box because the Legislature has not said 'chosen from such other persons present as may be selected.' This intolerable position is obviously not what was contemplated by the framers of the Code and we are therefore definitely of the opinion that 'chosen' in the second proviso simply means 'selected.' As we said before the decision recorded in Roshan Ali v. Emperor : AIR1927 Cal787 , has been dissented from by the Full Benches of the same Court which all support the view which we have taken. The

case of Abid Ali v. Emperor : AIR1929 Cal728 and Sadarat Shaikh v. Emperor (1928) 113 IC 328, cited by learned Counsel on behalf of the applicants to support his general contention that a defective procedure in empanelling the jury vitiates the trial are distinguishable, because in those cases persons who were asked to attend as jurors were not persons present in Court. A view similar to that which we have taken was taken by the Madras High Court in Anipe Pelladu v. Emperor (1917) 18 Cr LJ 15 and by majority of the Judges of the Patna High Court in the Full Bench case of Akbar Ali v. Emperor AIR 1928 Pat 1, which case should by implication be deemed to overrule the case of Tai Ali v. Emperor AIR 1928 Pat 31. It remains only to notice the case of this Court in Emperor v. Bradshaw (1911) 33 All 385. In that case as far as appears from the report only three jurors attended and were empanelled and it was held that the constitution of the jury was defective inasmuch as the jury should have consisted of five persons. That case is, therefore, distinguishable, and if it be deemed that Karamat Husain, J., upheld the contention of the appellants in that case that the constitution of the jury was defective on the-ground that the jurors who are to constitute the jury must be chosen by lot even under the proviso to Section 276, Cr.P.C., we are not prepared to agree with that view.

14. It is then argued that according to our view it may not be possible in certain cases to have an effective lottery, which is the basic idea in a jury trial. This criticism is not sound because if the procedure indicated by us is strictly followed there can be no haphazard choice of undesirable jurors. Under the second clause of Section 326, Cr.P.C., the names of the persons to be summoned shall be drawn by lot in open Court. This is the first effective lottery that takes place, and it is sufficient in the majority of cases to safeguard the interests of the accused. Then another effective lottery takes place at the opening of the trial, when the names of the persons summoned are put into the ballot box and they are called out one by one, when the accused has an opportunity to challenge each of them. The chance of a partial juror being empanelled is thus obviated as far as possible, and no further choice by lot seems either to be necessary or to be contemplated by the Code. We, therefore, hold that in this particular case there was no defect in the constitution of the jury. No objection was made at the time of the trial to any particular juror or to the mode of empanelling the jury, as far as we can gather

from the record, and no prejudice to the accused or failure of justice seems to have been occasioned. There is thus no force in the third contention advanced on behalf of the applicants.

15. It remains now to consider the fourth objection taken by learned Counsel on behalf of the applicants, namely, that the Assistant Sessions Judge contravened the provisions of law contained in Section 403, Criminal P.C. From what we have stated in the beginning of the judgment it appears that originally the jury returned a unanimous verdict of 'not guilty' on charges under Sections 333 and 225, I.P.C, and even after reconsideration they maintained that verdict, but varied it in so far that on a reconsideration directed by the Assistant Sessions Judge they returned a verdict of guilty under Sections 323 and 325, I.P.C. The learned Judge on appeal by the accused, who objected to their convictions under Sections 323 and 325, I.P.C. only, ordered a retrial because he was of the opinion that there was no warrant in law for the Judge to direct a reconsideration when the verdict of the jury was not in any way erroneous under the provisions of Sections 304, Criminal P.C. The appellate Court did not hold that there was any misdirection in the charge by the trial Court before the jury gave their original unanimous verdict of not guilty. The applicants before us, therefore, argued that the learned Assistant Sessions Judge on retrial was not authorized to frame charges under Sections 333 and 225, I.P.C, of which the applicants had been acquitted and regarding which there was no Government appeal. The reply on behalf of the Crown is that when a case has been sent back for retrial the whole case is opened and it is permissible to charge the accused of offences of which they have been acquitted even though there be no Government appeal. Reliance is placed upon Section 423, Cr.P.C., which defines the powers of an appellate Court, and Clause (b) of that section lays down that in an appeal from a conviction the appellate Court has the right to alter the finding, which, it is said, means that it has got the right to convict an accused of a charge of which he has been acquitted by the subordinate Court, the only, safeguard being that it cannot enhance the sentence. It is, therefore, contended that when an appellate Court orders a retrial it gives to the subordinate Court the right to alter the finding. The learned Government Pleader has cited before us the case of *Krishnadhan Mandal v. Queen-Empress* (1895) 22 Cal 377, in which it was held that when an appellate Court orders a retrial without any express limitation as

to the charges upon which such retrial is to be held, such retrial must be taken to be upon all the charges as originally framed and the acquittal of the accused on the previous trial upon some of the charges is no bar to the accused being tried on them again in view of the provisions of Section 423, Cr.P.C., and the provisions of Section 403, Cr.P.C., in that respect cannot apply to such cases. The important words in this decision are 'without any express limitation' and this might be deemed to include 'without any implied limitation' as well. There is yet another important point that was discussed in this case which leads us to think that this case is applicable only where an accused person is charged with and tried for various offences arising out of a single act or series of acts, it being doubtful which of those offences the act or acts constitute, that is to say, it will apply to those cases which are contemplated by Section 236, Cr.P.C. Their Lordships said that they wished it to be distinctly understood that what they have said in the case is intended to apply only to those cases which are contemplated by Section 236, Cr.P.C., They further said that where an accused is charged at one trial with distinct offences constituted by distinct acts a different principle will apply. The cases of *Queen Empress v. Jabanullah* (1896) 23 Cal 975, *Emperor v. Sardar* (1912) 34 All 115, *Gola Hanmappa v. Emperor* (1912) 35 Mad 243, *Janki Prasad v. Emperor* : AIR1926 All700 and the case of *Raghunath v. Emperor* : AIR1933 All565 , decided by a Bench of this Court (to which one of us was a party) on the 2nd of May 1933, are not applicable to the facts of the present case, because in those cases there was no question of a retrial, and they dealt only with the general powers of an appellate Court of convicting the accused on a charge of which he was acquitted by the subordinate Court. We are in the present case dealing with the powers of a subordinate Court on retrial, and we wish to point out that in *Krishnadhan Mandal's case* (1895) 22 Cal. 377 the learned Judges of the Calcutta High Court laid down certain reservations which we have already indicated. *Krishnadhan Mandal's case* (1895) 22 Cal. 377 was followed by the Calcutta High Court in *Nazimuddin v. Emperor* (1913) 40 Cal 163, but nothing inconsistent with the earlier case was laid down therein. The case of *Abdul Hamid v. Emperor* AIR 1927 Pat 13 is very instructive. The learned Judges held that *Krishnadhan Mandal's case* (1895) 22 Cal. 377 is applicable only in cases falling within Section 236, Cr.P.C., and where a retrial is ordered without any express limitation, and it is

only under those circumstances that an order for retrial will mean a retrial of the whole case. They further point out that

where there are two different sets of fact and a verdict has been given on one set which no one impugnes then it is difficult to see why when an appeal is brought on the other set of facts the order for retrial should reopen both.

16. In the case before us the charges were joined as is clear from illustration (a) under Section 235, Cr.P.C., and the order for retrial was by necessary implication an order for retrial only on the charges of which the accused were convicted. The irregularity committed by the Assistant Sessions Judge took place after the jury had pronounced their original verdict of acquittal on all the charges, when he directed them to reconsider their verdict in regard to the charges under Sections 323 and 325 I.P.C, but not their verdict in regard to Sections 333 and 225, I.P.C. The verdict under these two last sections was in fact accepted by the trial Judge, and the learned Judge in appeal did and could only order a retrial on the charges under Sections 323 and 325, I.P.C. We advisedly say 'could' because under Section 423, Clause 2, Cr.P.C., the appellate Court is not authorised to alter or reverse the verdict of the jury unless it is of opinion that such verdict is erroneous owing to misdirection by the Judge or to a misunderstanding on the part of the jury of the law as-laid down by him, and it is clear that the original verdict of the jury acquitting the accused under Sections 333 and 225, I.P.C., was not so erroneous. We have, therefore, come to the conclusion that the learned Assistant Sessions Judge was not justified in convicting the applicants before us under Sections 333 and 225, I.P.C. It was then argued on behalf of the Crown that under our revisional jurisdiction we should convict the accused under Ss, 323 and 325, I.P.C., and pass an appropriate sentence. Without deciding whether we have such a power under Section 439, Cr.P.C., we are of the opinion that regard being had to the particular facts of the present case, this is not a fit case in which we should so act, in view of the protracted trial which the applicants had to undergo. The result is that we allow this application upholding the last contention of the applicants, set aside the conviction and the sentence passed on them and direct that they be forthwith released unless wanted in some other case.

