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**(1927) 01 CAL CK 0032**

**Calcutta High Court**

**Case No:** None

Dibakar Das (Bene) APPELLANT

Vs

Saktidhar Kabiraj RESPONDENT

**Date of Decision:** Jan. 20, 1927

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 236, 237, 423(6)(2), 535, 537(a)
- Penal Code, 1860 (IPC) - Section 143

**Citation:** 101 Ind. Cas. 180

**Hon'ble Judges:** Suhrawardy, J; Cammiade, J

**Bench:** Division Bench

**Judgement**

1. The accused in this case was convicted by the trial Magistrate of an offence u/s 379, Indian Penal Code, and sentenced to pay a fine of Rs. 60. On appeal the District Magistrate set aside the conviction u/s 379 but convicted the accused u/s 143, Indian Penal Code, maintaining the sentence. This Rule has been obtained on the ground that the procedure followed by the District Magistrate is not correct in law and the petitioner having been convicted u/s 379, Indian Penal Code, on the findings arrived at by the Appellate Court he should have been acquitted. The view that where a person is charged under one offence and convicted of a different offence by the Appellate Court with which he was not charged it is beyond the power of an Appellate Court u/s 423(6)(2), has long prevailed in this Court. A case which is exactly in point is the case of Jatu Singh v. Mahabir Singh 27 C. 660 : 14 Ind. Dec. (N.S.) 433. There too the accused were convicted of theft and that was the only charge which they were called upon to answer. In appeal the District Magistrate held that no theft had been committed but he convicted them for being members of an unlawful assembly. It was held that the accused were called upon to answer only the charge of theft and as they were never called upon to answer any other charge, they could not be convicted on appeal of an offence of an entirely different character. This view was subsequently followed in the case of Yakub Ali v. Lethu Thakur 30 C. 288 where the accused were originally convicted of rioting which conviction was

changed by the Sessions Judge on appeal to one under Sections 448 and 323, Indian Penal Code. A similar view was expressed in Sita Ahir v. Emperor 16 Ind. Cas. 161 : 40 C. 168 : 13 Cr. L.J. 593 in which the further question that was not considered in the previous cases, namely, whether the defect was cured u/s 535 or 537(a), Criminal Procedure Code, was considered. The learned Judges held that the irregularity complained of was not curable under those sections. This point of view has now been, in our opinion, modified to some extent by the recent decision of the Judicial Committee in the case of AIR 1925 130 (Privy Council) . In that the accused were charged u/s 302, Indian Penal Code, only but they were ultimately convicted u/s 201, Indian Penal Code, for concealing the body of the deceased. Their Lordships held on the construction of Section 237, Criminal Procedure Code, that the conviction was justified in law. It is, therefore, correct to say that the law as it stands at the present moment is that if on the facts proved of which the accused may be taken to have notice another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed, he may be convicted under Sections 236 and 237, Criminal Procedure Code, of the other offences. But we have to consider in each particular case as to whether the procedure followed by the Judge, though it may be strictly correct in law, is one which should be adopted in that case. The correct view seems to us to have been laid down in the case of Lala Ojha v. Queen-Empress 26 C.863 : 3 C.W.N. 653 : 13 Ind. Dec. (N.S.) 1153 where the law is thus stated: [A] "If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting an accused person for an offence other than that for which he should have been properly charged, and if notwithstanding such error the accused has by his defence endeavoured to meet the accusation of the commission of these acts, then the Appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute, provided the accused be not prejudiced by the alteration in the finding. Such an error is one of form rather than of substance." [A] Applying the law as enunciated there to the facts of the case, we find that the accused was convicted by the Court of first instance on the allegation that the tree which he is said to have carried away did not belong to him. The trial Court did not come to any distinct finding with regard to the ownership of the tree but relying upon the Settlement Record held that it must have belonged to the complainant. The lower Appellate Court has found that the accused and his men were under the bona fide belief that the tree belonged to their tenant and, therefore, they could not be convicted of theft. But as they had gone to the spot armed they ought to be convicted u/s 143, Indian Penal Code. We cannot say that in the present case the accused has not been prejudiced by the alteration of the conviction to one u/s 143, Indian Penal Code, The defence in the two cases must be distinct. In the case u/s 379 the accused has only to establish his bona fides. In a case u/s 143, Indian Penal Code, he has to establish that the number was not more than five or that the object was not unlawful and that he did not attempt to enforce a lawful object by unlawful means. In this case the learned Vakil for the petitioner says that he is in a position to prove that the persons who went armed with him were labourers who went to cut the tree and carry it. These are matters which could have been properly raised and

tried if the original charge was u/s 143, Indian Penal Code. [B] It is doubtful if the irregularity like the one in the present case cannot be cured u/s 535 or 536 as it is only a matter of omission to frame a charge or a defect in the charge. But as we have found that in this case the accused has been prejudiced in his defence by his not being called upon in the trial Court to meet a case u/s 143, Indian Penal Code, we hold that the conviction is not justified. [B] There is also another point in the case, namely, that on the findings of the learned District Magistrate the conviction u/s 143, Indian Penal Code, cannot be sustained. His finding is that the accused bona fide believed that he had a right to the tree; but he with others committed an offence for being members of an unlawful assembly because he went there with more than five persons armed with lathis. [C] The mere fact that he went there armed with lathis with more than five persons will not ordinarily constitute an offence u/s 143, Indian Penal Code. [C] It is said that when the accused went to the spot there was no one there. So his object was not to use criminal force to get possession of the tree, but his object may, on the other hand, be to resist any aggression by the other party. In the view that we take of these questions we are of opinion that the Rule ought to be made absolute and we order accordingly. The conviction and sentence are set aside. The fine if paid will be refunded.