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by the respondents are not within the saving clause. In the result, it must be held that the right of the appellant to levy assessment under section 8 of Act No. II of 1876 is not limited by any right in the respondents.

We accordingly allow the appeal, set aside the judgments of the Courts below, and dismiss both the suits instituted by the respondents with costs throughout.

*Appeal allowed.*

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*March* 1

SURAJ PAL

*v.*

THE STATE OF UTTAR PRADESH.

[VIVIAN BOSE, JAGANNADHADAS and B. P. SINHA JJ.]

*Indian Penal Code (Act XLV of 1860), ss. 302, 307—Charges and conviction by trial court under s. 302 read with s. 149 and under s. 307 read with s. 149 of the Code—Conviction by the appellate court under ss. 302 and 307 of the Code—Legality—Code of Criminal Procedure (Act V of 1898), ss. 236, 237—Applicability—Retrial.*

Where a person has been charged along with others under ss. 302 and 307 of the Indian Penal Code each, only as read with section 149 of the Code, his convictions and sentences for the substantial offences under ss. 302 and 307 of the Code are erroneous. The absence of specific charges in this behalf is a serious lacuna in the proceedings, inasmuch as the framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence is the foundation for a conviction and sentence therefor. The conviction in these circumstances under ss. 302 and 307 of the Code and sentences of death and transportation for life cannot be maintained unless the Court is satisfied, on the facts of the case, that the accused has not been prejudiced in his trial. Whether or not in such a situation the questioning of the accused during the course of his examination under s. 342 of the Code of Criminal Procedure in relation to the offences under sections 302 and 307 of the Indian Penal Code can be relied upon as obviating the likelihood of prejudice has to be determined with reference to the facts and ircumstances of each case.

All the circumstances of the case and the evidence and materials on the record should be looked into on the question arising in such a situation as to whether a retrial should be ordered or not.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 139 of 1954.

Appeal by Special Leave from the Judgment and Order dated the 29th April 1954 of the Allahabad High Court in Criminal Appeal No. 1101 of 1953 and Referred No. 111 of 1953 arising out of the Judgment and Order dated the 3rd September 1953 of the Court of the Sessions Judge at Fatehpur in Sessions Trial No. 50 of 1953.

*Sadhan Chandra Gupta* and *Janardhan Sharma,* for the appellant.

*K. B. Asthana* and *C. P. Lal,* for the respondent.

1955. March 1. The Judgment of the Court was delivered by

JAGANNADHADAS J.—This is an appeal by special leave from the judgment of the High Court at Allahabad. The sole appellant before us has been convicted by the Sessions Court under sections 148, 307 and 302 of the Indian Penal Code, and sentenced to rigorous imprisonment for two and a half years under section 148, to transportation for life under section 307, and to death under section 302. These convictions and sentences have been confirmed by the High Court. At the trial there were 19 other accused along with this appellant. All of them were convicted and sentenced by the trial court under various sections of the Indian Penal Code. On appeal ten out of them were acquitted by the High Court. In respect of the remaining nine besides this appellant, the convictions and sentences were partially modified. But this appeal is not concerned with them. The incident in the course of which these offences are said to have been committed took place in the evening of the 4th January, 1953, shortly before sun set in a village called Sonari in the district Fatehpur, Uttar Pradesh. During that incident two persons, Bisheshwar and Surajdin, are alleged to have received gun-shot wounds. Bisheshwar survived but Surajdin died on the spot. The back-ground for this incident was as follows: In the village of Sonari there were two factions between whom there was prior history of enmity resulting in criminal prosecutions by each against the other. It

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may be broadly stated that the accused persons in the present case belong to one party and the prosecution witnesses as well as the deceased person belong to the other party. In the year 1946 there was rioting between them in which two of the present prosecution witnesses were assaulted. This led to a criminal case against some of the present accused and other, in which they were convicted and sentenced, the members of the other party figuring therein as prosecution witnesses. Again, just five months prior to the present incident, there was another rioting in the village between these two groups. In that, one Ram Bharosey a member of the party of the present accused was killed. As a result 15 persons of the opposite-party (i.e. the party of the present prosecution witnesses) were prosecuted. By the date of this incident that case had been committed to the sessions but the sessions trial had not started. According to the prosecution case, the occasion for the incident, which concerns us, was that some of the present accused wanted to persuade or prevent a member of the opposite-party by name, Bisheshwar—P.W. 2 in this case—from doing what is called *pairavi* on behalf of the accused in that case. (*Pairavi* is said to be the active assistance in relation to Court proceedings which a friend or agent renders to a litigant). While, Bisheshwar, P. W. 2, and two others Bhurey Lal, P.W. 1, and Ram Saran, P.W. 3, were sitting in front of the house of Ram Saran on the evening of the 4th January, 1953, the present appellant and the other accused are said to have turned up before them, lathies in hand. The appellant is said to have asked Bisheshwar to give up doing *pairavis* in the then pending case on behalf of the accused therein. Bisheshwar having declined to do so, the appellant is said have pulled out a pistol from his inner pocket and fired at him, as a result of which he fell down on the ground. P.Ws. 2 and 3 are said to have dragged him inside the house and chained the door from inside, run up the roof and raised an alarm, whereupon a number of persons of the other party are said to have come running up. One of the persons who so came running up was

Surajdin who was cutting fodder at the house of Bhurey Lal, P.W. 1. The appellant is said to have fired at him with the pistol. He fell down and died on the spot. Another person named Gaya Prasad is said to have received some minor lathi injuries. Accused party thereafter is said to have run away. First information of the report was lodged by Bhurey Lal, P.W. 1, near about 12 that very night at the police station which was about nine miles from the scene of the occurrence. The police came on the scene the next morning and the usual investigation followed. The police filed on the 22nd February, 1953, a charge-sheet for offences under sections 147, 148, 323/149 and 307/149. The charge-sheet in so far as it was under section 323/149 related presumably to some minor injuries said to have been received by Gaya Prasad, and in so far as it was under section 307/149 related presumably to the gun-shot wounds received by Bisheshwar, P.W. 2. It may be noticed that the charge-sheet did not concern itself with any offence or offences alleged to have been committed, in bringing about the death of Surajdin by the firing of a pistol at him. It is on this charge-sheet that cognizance of the case was taken by the Magistrate and committal proceedings were started. It appears, however, that the complainant-party finding that the police challan did not relate to the offence under section 302, Indian Penal Code filed, on the 2nd May, 1953, a private complaint, before the very Magistrate in whose court the commital proceedings were by then pending. That complaint was filed by the same Bisheshwar, P.W. 1, who lodged the first information in this case on the 5th January, 1953. It sets out substantially the same facts. This complaint also was taken on the file of the Magistrate. The enquiry thereon was merged into the enquiry relating to the police challan case. The Magistrate eventually committed all the 20 accused to take their trial before the sessions Judge by framing charges, under sections 147, 323/149, 307/149 and 302/149. There was a specific charge under section 148, Indian Penal Code against Suraj Pal and

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Dharm Raj, the former for being armed with a pistol and the latter for being armed with a *pharsa,* at the time of the commission of the rioting. It is in respect of charges so framed by the committing Magistrate without any amendment or alteration that the accused were tried in the Sessions Court. It may be mentioned at this stage that the defence of the accused, apart from the general denial of their having anything to do with the incident and denials as to their having been present at the occurrence, was to the effect that it was the complainant's party including the deceased Surajdin who formed the unlawful assembly, with the common object of beating one Ram Pal of the village. This Ram Pal had appeared as a prosecution witness at the committal stage in the criminal proceedings by then pending against the present prosecution witnesses as accused. It was also their defence that it was one Ram Bhawan of that party who, in the course of the incident, fired pistol shots in the air and also shot, later, Surajdin and brought about his death.

The learned Sessions Judge found all the accused guilty of the various offences as charged and sentenced them. On appeal the High Court considered the prosecution evidence with reference to three aspects. (1) How far the manner in which the prosecution alleged the incident to have taken place can be accepted; (2) How far the prosecution case regarding the presence and participation of the various persons can be accepted; and (3) What offence can be said to have been made out as against each of them. On the first question the High Court accepted the view that the incident took place as alleged by the prosecution. With reference to the second, the High Court set out elaborately various reasons why the prosecution evidence in so far as it implicates particular individuals, could not be accepted at its face value and required to be carefully scrutinised. With reference to certain criteria which it was considered necessary and right to adopt for purposes of scrutiny, the High Court held that the convictions of ten out of the 20 persons before it should be set aside and that

the other ten persons including the present appellant were participants in the rioting. Accordingly, the Court confirmed the conviction as against these ten under section 147, Indian Penal Code. As regards the charge under section 148, Indian Penal Code, Dharm Raj was acquitted but the conviction of Suraj Pal was maintained on the ground of his having a pistol in his hand at the time of the rioting. There remained the three charges against the ten persons under sections 323/149 for injuries on Gaya Prasad, 307/149 in respect of the gun-shot wounds received by Bisheshwar, and 302/149 in respect of the murder of Surajdin. It was held that the assault on Gaya Prasad was not proved beyond doubt and hence all the accused were acquitted in respect of this charge. As regards the other two charges, *i.e.*, under sections 307/149 and 302/149, the High Court came to the conclusion that neither the attempt on the life of Bisheshwar by pistol fire nor the actual death of Surajdin by pistol fire can be said to have been in prosecution of the common object of the unlawful assembly nor to have been within the knowledge of the accused as being so likely. It was, therefore, held that none of the accused could be found guilty under section 149, with reference to, the attempt on the life of Bisheshwar, or the death of Surajdin. All the same, in view of the fact that the evidence showed that the person who inflicted the pistol fire as against both was the appellant Suraj Pal, it was held that he was guilty of the offences under sections 307 and 302, Indian Penal Code. On this ground, therefore, the High Court, while it set aside the convictions and sentences of all the accused under sections 307/149 and 302/149, maintained the convictions of the appellant under these two sections and maintained the sentences of transportation for life under section 307 and of death under section 302, Indian Penal Code. The High Court convicted the other nine persons under section 323/149 in respect of the injuries received by P.W. 2 and sentenced them therefor.

On the above statement of the course of these proceedings, one important fact which emerges is that

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there have been *no* direct and individual charges against the appellant for the specific offences under sections 307 and 302, Indian Penal Code. The question that arises is whether, without such direct charges the convictions and sentences for those offences can be maintained. It appears to us quite clear that a charge against a person as a member of an unlawful assembly in respect of an offence committed by one or other of the members of that assembly in prosecution of its common object is a substantially different one from a charge against any individual for an offence directly committed by him while being a member of such assembly. The liability of a person in respect of the latter is only for acts directly committed by him, while in respect of the former, the liability is for acts which may have been done by any one of the other members of the unlawful assembly, provided that it was in prosecution of the common object of the assembly or was such as the members knew to be likely to be so committed. A charge under section 149, Indian Penal Code puts the person on notice only of two alleged facts, *viz.*, (1) that the offence was committed by one or other of the members of the unlawful assembly of which he is one, and (2) that the offence was committed in prosecution of the common object or is such that was known to be likely to be so committed. Whether or not section 149, Indian Penal Code creates a distinct offence (as regards which there has been conflict of views in the High Courts), there can be no doubt that it creates a distinct head of criminal liability which has come to be known as "constructive liability"—a convenient phrase not used in the Indian Penal Code. There can, therefore, be no doubt that the direct individual liability of a person can only be fixed upon him with reference to a specific charge in respect of the particular offence. Such a case is not covered by sections 236 and 237 of the Code of Criminal Procedure. The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor. The absence, therefore, of specific

charges against the appellant under sections 307 and 302, Indian Penal Code in respect of which he has been sentenced to transportation for life and to death respectively, is a very serious lacuna in the proceedings in so far as it concerns him. The question then which arises for consideration is whether or not this lacuna has prejudiced him in his trial.

It is perfectly true that the initial accusation as disclosed by the first information lodged by the complainant, P.W. 1, on the 5th January, 1953, specifically, was to the effect that it was this appellant who with a pistol fired both as against Bisheshwar, P.W. 2, as also against the deceased, Surajdin. It is also true that this allegation was repeated in the private complaint filed by this same P.W. 1 in May, 1953, directly before the Magistrate. It is also undeniable that the evidence in court, both in the committal proceedings as well as at the sessions trial, given by the prosecution witnesses was in support of that allegation. But curiously enough, apart from the absence of any individual charges against the appellant for these specific offences, even the charges against him and others relating to the injuries inflicted on P.W. 2 and the deceased Surajdin are somewhat vague as to the authorship thereof. The relevant charges run as follows (after specifying the members alleged to constitute the unlawful assembly) :

"Firstly :—That you, on the 4th day of January 1953 at about half an hour before sunset in village Sonari, formed an unlawful assembly with the common object of committing the murders of Bisheshwar and Suraj Din and committed rioting.

And thereby committed an offence punishable under section 147 of the Indian Penal Code.

Secondly :—That you on the same date, time and place, in prosecution of the common object of the said unlawful assembly of which you were members at that time committed the murder of Suraj Din *who was shot dead by a pistol fire.*

And thereby committed an offence punishable under section 302/149 of the Indian Penal Code.

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Thirdly :—That you on the same date, time and place, in prosecution of the common object of the said unlawful assembly of which you were members at that time attempted to commit the murder of Bisheshwar Singh *by means of a pistol fire.*

And thereby committed an offence punishable under section 307/149 of the Indian Penal Code".

The portions underlined (for the purposes of this judgment) in the charge under heads 2 and 3 above are curiously vague. They appear to indicate a definite non-committal attitude on the part of the Public Prosecutor and the Court, which has the ultimate responsibility for the framing of the charge, (vide section 226, Code of Criminal Procedure) as to who is the active author of the pistol fire referred to under these two heads of charge. When the charge was so pointedly vague, no accused was bound to direct his attention in his defence to the question as to whether he or somebody else was the person who fired the pistol which brought about the gun-shot wounds. It has been brought to our notice that the appellant has been specifically questioned in the Court of Sessions under section 342, Code of Criminal Procedure on the footing that he was the person who fired at P.W. 2 and the deceased, Surajdin, and that the accused denied it. But this cannot be said to remove any prejudice that would arise by virtue of the vagueness in the charge at the sessions trial, as to who was the author of the pistol fire. Normally in a sessions trial the accused has no right of cross-examination after the questioning under section 342, Code of Criminal Procedure. It has been suggested that since such a question was put also in the questioning by the committing Magistrate under section 342, Code of Criminal Procedure, the accused had ample notice of this specific case before the commencement of the sessions trial. But it does not follow that there could be no prejudice. On the other hand, the very fact that in spite of such questioning the charges framed in the Magistrate's Court, with their vagueness, in so far as this feature therein is concerned, has been

maintained, before the Sessions Court without any amendment, is likely to have been misleading. The appellant might well have relied on the absence of any such amendment as being an indication that he was not called upon to defend himself on the footing of his being the author of the pistol fire. In a case so serious as that which involves the sentences of transportation for life, and of death, and particularly in a case like the present one, where the death sentence has been awarded in the trial court by distinguishing this appellant from all the other accused in respect of his individual act by way of pistol fire, it is difficult to say that the accused has not been prejudiced by the absence of specific charges under sections 307 and 302, Indian Penal Code. Further, the medical evidence indicates that P.W. 2 as well as the deceased Surajdin had gun-shot wounds on their person. The evidence of the Doctor is to the effect that these wounds may have been caused by a country pistol which, it is alleged, the appellant had in his hand. It has been suggested on behalf of the defence that the Medical Officer was not competent to speak about it and that if the prosecution wanted to rely thereupon, they should have called an arms expert to speak to the same. Whether or not this comment is legitimate, it is clear that if the appellant is to be found directly responsible for inflicting the wounds, noted as gun-shot wounds by the Medical Officer, he might well have availed himself of the opportunity to elucidate, by cross-examination or positive defence, the nature of the fire-arm which would have caused the actual injuries found on the bodies of P.W. 2 and of deceased Surajdin. In all the circumstances above noticed, we are satisfied that the absence of specific charges against the appellant under sections 307 and 302, Indian Penal Code has materially prejudiced him. We must accordingly set aside the convictions and sentences of the appellant under sections 307 and 302 of the Indian Penal Code.

The further question that arises is whether or not we are to direct a retrial of the appellant in respect of these offences. We have given our best considera-

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tion to all the circumstances of this case and have for this purpose looked into the evidence and the material on the record. The case discloses certain outstanding features. At the very outset and simultaneously with the first information filed by P.W. 1 in this case, there was another report filed by one Ram Pal at the same police station, almost exactly at the same time, relating to the same incident. This is Ex. P-16 on the record. This report is said to have been lodged at the police station at 12-15 in the night, while the other report is said to have been lodged at 12-10 that night. The report, Ex. P-16 alleged the present prosecution party to be the aggressors and put forward, as the occasion for the incident, an attempt on the part of the prosecution party to beat Ram Pal, the complainant of that complaint, for having given evidence in support of the prosecution in the committal proceedings of the rioting case then pending against the present prosecution witnesses (as accused therein)—obviously with a view to prevent him from giving evidence in the Sessions Court against them. That complaint specifically refers to one Ram Bhawan who is P.W. 4 in the present case as the person who had a pistol in hand and fired with it. That report makes no mention of any injuries having been by then received from pistol fire, in the course of that incident. Of course, there is no proof, in this case, of any of the allegations in that report. But it appears from the order of commitment in this case (which forms part of the present printed record) that with reference to that report there was pending, at the date of the committal, a cross-case against some of the prosecution witnesses in the present case for the same incident. The police constable moharrir of the police station where the counter complaint, Ex. P-16 was lodged and who accepted both the complaints (1) from Bhurey Lal, and (2) from Ram Pal, has stated in his evidence that when the complaint, Ex. P-16, was filed by Ram Pal the present appellant Suraj Pal had also accompanied Ram Pal, the complainant therein. This may well be claimed to be the conduct of an innocent person. It is also not without some significance

that admittedly and as a matter of fact, the police did not file any charge-sheet in the present case against any one for the actual offence of murder under section 302, Indian Penal Code and that even in the charge-sheet which they did file they confined the case to section 307, Indian Penal Code but did not commit themselves as to who out of the members of the unlawful assembly was the author of the pistol fire. So far as it appears from the police charge-sheet dated the 22nd February, 1953, as printed in the record before us, there is a statement therein to the effect "Suraj Pal Singh *and* Ram Manohar were armed with pistols". Ram Manohar is also one of the accused who was put up for trial. The statements of some of the prosecution witnesses furnish indication of more than one fire-arm having been used at the incident. Thus, for instance, Bisheshwar, P.W. 2, said "I heard 3 or 4 guns being fired outside and also heard a noise". P.W. 4, Ram Bhawan, said "We four persons threw lumps of earth from the well at the accused persons, the accused retired and fired their gun twice..... .....The accused had fired a gun from the door of Mahadeo when going away, then had fired two or three guns from his door". P.W. 5, Gaya Prasad, said "Two or three guns afterwards had been fired from the door of Mahadeo Pandit. Those guns had been fired from the lane. The guns had been fired at the door of Ram Saran and had hit it". All these witnesses no doubt assert that so far as the particular injuries with which this case is concerned the firing was by the appellant Suraj Pal. But the above statements by these witnesses in the cross-examination may well indicate that there may have been other persons in the unlawful assembly at that time with arms in their hands, who made use of them by firing. Apart from the use of pistols in the course of that incident, by one party or the other, there are clear indications that there was a mutual fight between both the parties. Two of the persons on the side of the accused, viz. Lal Pratap and Chedi Lal have received some injuries and their injury certificates have

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been marked as Exs. D-1 and D-2. The prosecution witnesses themselves admit that there was mutual fighting to this extent, viz. that there was also throwing of brickbats by the complainant's party against the rioters. As already stated there is in fact a counter case against some of the present prosecution witnesses in respect of the same incident. In such a situation any further trial is likely to result only in very doubtful and unreliable evidence being adduced after a considerable lapse of time. Even as it is, the evidence recorded in the present case has been found by the High Court in its judgment as not acceptable at its face value. The learned Judges have dealt with this aspect at length and they wound up their consideration of this part of the case as follows:

"For the above reasons, I am of opinion that there is a good deal of substance in this part of the arguments of the appellants' counsel. The question that would arise is as to which of the particular accused is guilty and what should be the criterion for deciding this matter. In view of the biassed and interested nature of the prosecution evidence, I am of opinion that the presence of only those accused should be held to have been proved who have been assigned any definite part by the prosecution witnesses or whose presence is corroborated by some other circumstantial evidence. In view of the highly interested nature of the prosecution evidence, dealing with the first aspect of the case also, viz. the question as to how far the prosecution have succeeded in proving the manner in which the incident occurred, I have not accepted the prosecution case unless it found corroboration from some other factor of a circumstantial nature or from probabilities of the case".

It is by reference to these standards that they have rejected the evidence of the prosecution witnesses in so far as they implicated ten other accused whom the High Court acquitted. But it appears to us, that judged by the very same standards there is no adequate reason for accepting the evidence as being reliable in respect of this appellant also. In fact there is good reason to feel that on the same standards this appel-

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lant also should have got the benefit of the doubt. At this stage, it is not out of place to mention one fact. It appears from the evidence of the Investigating Officer, P.W. 14, that in the course of the investigation the prosecuting authorities were of the opinion that the murder in this case was to be attributed to the prosecution witness, Ram Bhawan, P.W. 4, and not to the appellant, and that in their view even the evidence as against Ram Bhawan was not sufficient to put him on trial for the murder. Doubtless such an opinion of the prosecuting authorities has no relevancy in the case and should not have been placed on the record in this case. But when we have to consider the desirability or otherwise of retrial, we need not shut our eyes to these features of the case which have been brought on the record. In the circumstances mentioned above we do not consider that the interests of justice require that any retrial should be ordered. We accordingly direct that there shall be no retrial.

In the result, the convictions of the appellant under sections 307 and 302 of the Indian Penal Code and the sentences therefore are hereby set aside. But his conviction under section 148 of the Indian Penal Code is maintained as also the sentence of two years and a half in respect thereof. This appeal is accordingly allowed partially to the extent indicated above.

*Appeal partially allowed.*

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*March 2*

## THE DIVISIONAL ENGINEER, G.I.P. RAILWAY
*v.*
## MAHADEO RAGHOO AND ANOTHER.

[VIVIAN BOSE, JAGANNADHADAS, VENKATARAMA AYYAR and B. P. SINHA JJ.]

*Payment of Wages Act, 1936 (IV of 1936), s. 2 (vi)—Wages—House rent allowance—Whether falls within the definition of wages under the Act—Rule 3(i) of the statutory Rules framed by the Government—Legal effect thereof.*

The Railway Board under the Ministry of Railways of the Government of India introduced a scheme with effect from the 1st