Willie (William) Slaney

Vs

The State of Madhya Pradesh

Criminal Appeal No. 6 of 1955

(CJI S. R. Dass, Syed Jafar Imam, B. Jagannath Das, Vivian Bose, N. Chandrashekar Aiyar JJ)

31.10.1955

JUDGMENT

BOSE J. -

This appeal was referred to a Bench of five Judges in order to determine whether there was a conflict of view between Nanak Chand v. The State of Punjab ([1955] 1 S.C.R. 1201) and Suraj Pal v. The State of U.P. ([1955] 1 S.C.R. 1332) and if so, to determine it.

The appeal is against a conviction for murder in which the lesser sentence was given. The main ground is that the appellant was charged under section 302 of the Indian Penal Code read with section 34. His co-accused was acquitted, so, it was urged, the element of common intention drops out and accordingly section 34 cannot be called in aid. But the Courts below hold that the appellant inflicted the fatal blow and have made him directly liable for the murder. He contends that as he was not charged with having murdered the man personally he cannot be convicted under section 302. He relies on certain observations in Nanak Chand v. The State of Punjab ([1955] 1 S.C.R. 1201) and contends that the conviction is an illegality which cannot be cured and claims that he must either be acquitted or, at the most, be retired, though he adds further that in the circumstances of this case the Court should not in the exercise of its discretion order a retrial. As against this it is contended for the State that an omission to frame a separate charge in the alternative under section 302 simpliciter is a curable irregularity provided there is no prejudice to the accused. Therefore, the only matter for determination is a question of fact whether there was prejudice in this case.

The charge was as follows :

> "That you, on or about the 12th day of February, 1953, at Civil Lines, Jabalpur, went with your brother Ronnie Slaney to the house of Mrs. Waters (P.W. 20) at about 7 p.m. and in furtherance of the common intention did commit murder by intentionally or knowingly causing the death of her brother D. Smythe and thereby committed an offence punishable under section 302 of the Indian Penal Code read with section 34 of the Indian Penal Code....."

An exactly similar charge with the necessary change of name was framed against the co-accused Ronnie Slaney.

It was contended on behalf of the State that this is really a charge under section 302 of the Indian

Penal Code and that the references to common intention and to section 34 are mere surplusage. There is much to be said for this but we will assume in this case (without so deciding) that the charge is ambiguous and that it means what the appellant says it means, namely a charge under section 302 read with section 34 and not one under section 302 simpliciter. On that assumption the question for our decision is whether the omission to frame an alternative charge under section 302 to the Indian Penal Code is an illegality that cuts at the root of the conviction and makes it invalid or whether it is a curable irregularity in which all that we are concerned to see is whether there was prejudice. What it narrows down to is this. Is the charge to be regarded as a ritualistic formula so sacred and fundamental that a total absence of one, or any departure in it from the strict and technical requirements of the Code, is so vital as to cut at the root of the trial and vitiate it from the start, or is it one of many regulations designed to ensure a fair and proper trial so that substantial, as opposed to purely technical, compliance with the spirit and requirements of the Code in this behalf is enough to cure departures from the strict letter of the law ?

Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood line that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these mattes are dealt with by the Code and wherever that is the case full effect must be given to its provisions. The question here is, does the Code deal with the absence of a charge and irregularities in it, and if so, into which of the two categories does it place them ? But before looking into the Code, we deem it desirable to refer to certain decisions of the Privy Council because much of the judicial thinking in this country has been moulded by their observations. In our opinion, the general effect of those decisions can be summarised as follows.

First comes a class of case in which the Code deals with the matter expressly. In that event, full effect must be given to the plain meaning of the words used.

> "The language of that Code is conclusive, and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt, in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail". Babulal Choukhani v. The King-Emperor ([1938] L.R. 65 I.A. 158, 175).

And at page 177 -

> "But, even so, that can be no ground why the Court should misconstrue the section".

and at page 178 -

> "Their Lordships decide the question on what they regard as the plain meaning of the language used".

Next comes a class of case for which there is no express provision in the Code, or where there is ambiguity. In that event, the question is whether the trial has been conducted in substantial compliance with the Code or in a manner substantially different from that prescribed.

> "When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subramania Iyer's case ([1901] L.R. 28 I.A. 257, 263)), the trial is bad and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code". Pulukuri Kotayya v. King Emperor ([1947] L.R. 74 I.A. 65, 75).

Now it is obvious that the question of curing an irregularity can only arise when one or more of the express provisions of the Code is violated. The question in such cases is whether the departure is so violent as to strike at the root of the trial and make it no trial at all or is of a less vital character. It is impossible to lay down any hard and fast rule but take by and large the question usually narrows down to one of prejudice. In any case, the court must be guided by the plain provisions of the Code without straining at its language wherever there is an express provision.

For a time it was thought that all provisions of the Code about the mode of trial were so vital as to make any departure therefrom an illegality that could not be cured. That was due to the language of the Judicial Committee in N. A. Subramania Iyer v. King Emperor ([1901] L.R. 28 I.A. 257, 263).

Later this was construed to mean that that only applies when there is an express prohibition and there is prejudice. In Subramania Iyer's case ([1901] L.R. 28 I.A. 257, 263), the Privy Council said -

> "The remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enact that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes with the description of error, omission or irregularity".

This was examined and explained in Abdul Rahman v. King-Emperor ([1926] L.R. 54 I.A. 96, 109), as follows :

> "The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused".

In our opinion, the key to the problem lies in the words underlined. Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal

to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth. These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once. Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

This, in our opinion, has been the trend of the more recent decisions of the Privy Council and indeed of latter-day criminal jurisprudence in England as well as in India. The swing of the pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered.

The more recent attitude of the Judicial Committee is summed up by Sir John Beaumont in Pulukuri Kotayya v. King-Emperor ([1947] L.R. 74 I.A. 65, 75) where he says that -

> "The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind"

and by Viscount Summer in Atta Mohammad v. King-Emperor ([1929] L.R. 57 I.A. 71, 76) -

> "In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere".

We prefer this way of stating the law, for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to substantial denial of a trial as contemplated by the Code and understood by the comprehensive expression "natural justice". It will be observed that disregard of an express prohibition was regarded as curable in Zahiruddin v. King-Emperor ([1947] L.R. 74 I.A. 80) so the question whether a particular provision is stated in positive or in negative terms is not the true criterion.

It is possible (though we need not so decide in this case) that the recent amendment to section 537 in the Code of Criminal Procedure (Amendment) Act XXVI of 1955, where misjoinder of charges has been placed in the curable category, will set at rest the controversy that has raged around the true meaning of N. A. Subramania Iyer v. King-Emperor ([1901] L.R. 28 I.A. 257). In any case, our opinion is that the real object of the Code is to leave these matters to the discretion and vigilance of the courts. Slightly to alter the language of the Privy Council in Babulal Choukhani v. The King-Emperor ([1938] L.R. 65 I.A. 158, 177) we would say -

> "It must be hoped, and indeed assumed, that magistrates and judges will exercise their jurisdiction fairly and honestly. Such is the implied condition of the exercise of judicial power. It they do not, or if they go wrong in fact or in law, the accused has

> prima facie a right of recourse to the superior courts by way of appeal or revision; and the cases show how vigilant and resolute the High Courts are in seeing that the accused is not prejudiced or embarrassed by unsubstantial departures from the Code and how closely and jealously the Supreme Court guards the position of the accused. These safeguards may well have appeared to the Legislature to be sufficient when they enacted the remedial provisions of the Code and have now left them substantially unaltered in the new Code recently introduced".

This, we feel, is the true intent and purpose of section 537(a) which covers every proceeding taken with jurisdiction in the general phrase "or other proceedings under this Code". It is for the Court in all these cases to determine whether there has been prejudice to the accused; and in doing so to bear in mind that some violations are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and without anything else they must be struck down, while in other cases a close examination of all the circumstances will be called for in order to discover whether the accused has been prejudiced.

We now proceed to examine the relevant sections of the Code. Chapter XLV deals generally with irregular proceedings. There are certain irregularities which do not vitiate the proceedings. They are set out in section 529. No question of prejudice arises in this class of case because the section states categorically that they shall not vitiate the proceedings. Certain other irregularities are treated as vital and there the proceedings are void irrespective of prejudice. These are set out in section 530. A third class is dealt with in section 531, 532, 533, 535, 536(2) and 537. There, broadly speaking, the question is whether the error has caused prejudice to the accused or, as some of the sections put it, has occasioned a failure of justice. The examples we have given are illustrative and not exhaustive. What we are seeking to demonstrate is that the Code has carefully classified certain kinds of error and expressly indicates how they are to be dealt with. In every such case the Court is bound to give effect to the express commands of the legislature : there is no scope for further speculation. The only class of case in which the Courts are free to reach a decision is that for which no express provision is made.

The present case is concerned with the nature of the charge and we find that the Code expressly deals with this in several of its sections. Our only task therefore is to interpret them and, having propounded their meaning, to give effect to whatever they say.

Now there is no doubt that a charge forms the foundation of a sessions trial and is a most important step in it. The accused must know and understand what he is being tried for and must be told in clear and unambiguous terms : section 271(1). There can be no shirking that or slurring over it, and this must appear on the face of the record. It cannot be established by evidence taken after the trial. But there is, in our opinion, equally no doubt that the Code expressly deals with this and expressly provides that no error, omission or irregularity in the charge, or even total absence of a charge, shall vitiate a trial unless prejudice to the accused is shown. This is repeatedly reiterated in a number of sections. The whole question therefore is whether the "charge" must be formally reduced to writing and expressed as a ritualistic formula in order to save the trial from the fundamental defect of an incurable illegality or whether the information that is the substance of the matter can be conveyed in other ways. The question is whether we are to grasp at the substance or play hide and seek among the shadows of procedure.

First of all, sections 221 to 223 of the Code, which undoubtedly envisage a formal written charge, set out what a charge must contain. A perusal of them reveals the reasons why a charge is required.

It must set out the offence with which the accused is charged and if the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated "as to give the accused notice of the matter with which he is charged". The charge must also contain such particulars of date, time, place and person "as are reasonably sufficient to give the accused notice of the matter with which he is charged"; and section 223 says -

> "When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose".

It is clear to us that the object of the charge is not to introduce a provision that goes to the root of jurisdiction as, for example, the requirement of previous sanction under section 197, but to enable the accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. But there are other ways of conveying this information. For example, in summons cases no formal charge is required : all that is necessary is to tell the accused the substance of the accusation made against him (section 242). The whole question is whether, in warrant cases and in sessions trials, the necessary information must be conveyed in one way and one way only, namely in a formal charge in order that the entire trial may not be ipso facto vitiated because of an incurable illegality, or whether that can be done in other and less formal ways, provided always that it is in fact conveyed in a clear and unambiguous manner and in circumstances that the court will regard as fair and in substantial, as opposed to purely technical, compliance with the requirements of the Code. The law could have provided one way as easily as another, but what it has chosen to do is set out in the following sections.

The marginal note to section 225 is headed "Effect of errors" and the section states that -

> "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice".

Therefore, when there is a charge and there is either error or omission in it or both, and whatever its nature, it is not to be regarded as material unless two conditions are fulfilled both of which are matters of fact : (1) the accused has in fact been misled by it and (2) it has occasioned a failure of justice. That, in our opinion, is reasonably plain language.

Next, sections 226 and 227 show that errors in a charge, and even the total absence of a charge, do not vitiate a trial from the start so as to render it no trial at all as would the absence of sanction under section 197. This is evident because these errors and omissions can be remedied at any time during the course of the trial in the sessions Court (section 226) or even at the very end of the trial (section 227), and when this is done the trial need not proceed de novo but can go on from the stage at which the alteration was made provided neither side is prejudiced (section 228). That is conclusive to show that no error or omission in the charge, and not even a total absence of a charge, cuts at the root of the trial. The proceedings up to the stage of the alteration, which, as we have seen, can be at the very end of the trial, are not vitiated unless there is prejudiced; they are good despite these imperfections. That is impossible when the error is so vital as to cut at the root of the trial. It follows that errors in the charge, and even a total absence of a charge, are not placed in the non-curable class.

Next, we have a case in which the error is not observed and corrected during the trial and the accused is convicted. In such a case, the High Court is empowered to direct a retrial only if, in its opinion, the accused was "misled in his defence" (section 232). It is to be observed that this is so whether there was a total absence of a charge or merely an error in it. It is evident that a conviction cannot stand if the defect cuts at the root of the trial, therefore defects even of this nature are not regarded as fatal.

From there we proceed to section 535. The marginal note is "Effect of omission to prepare charge", and the section says -

> "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".

Here again the language is clear and wide and emphatic. The section summarises what was already indicated in sections 226, 227, 228 and 232.

Next, there is section 537 :

> "Subject to etc..... no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account -
>
> (a) of any error, omission or irregularity in the..... charge..... or other proceedings before or during trial ..... unless such error, omission, irregularity ..... has in fact occasioned a failure of justice".

The Explanation is also important :

> "In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings".

This repeats what was set out in greater detail in section 225 and is all the more impressive because even when a death sentence is under review in confirmation proceedings under Chapter XXVII the Court is expressly directed not to regard any error, omission or irregularity in the charge as fatal unless it has in fact occasioned a failure of justice. Reading these provisions as a whole, there is, in our opinion, no room left for doubt about what was intended.

It was argued on behalf of the appellant that these sections must be read along with sections 236, 237 and 238. Counsel conceded that there are occasions when an accused person can be convicted in the absence of a charge but he said that they are expressly set out in sections 237 and 238 and he contended that no further departure is permissible. He put his argument as follows. He said that sections 237 and 238 deal with cases in which there is a charge to start with but none to support a conviction for an offence which the Court feels is made out by the evidence. These sections define the limits within which the Court may convict in spite of the fact that there is no charge for that particular offence. When section 535 is read along with these two sections it is seen that it cannot apply to a case in which there is no charge at all, nor can it apply to any case that is not covered by these two sections. It is limited to cases in which sections 237 and 238 permit a conviction without a

charge.

In answer to this the following argument was put to counsel and he was asked to meet it. The point was put this way. Section 535 cures convictions that would be invalid but for its provision. This, it was said, follows from the words "shall be deemed invalid". It was suggested that these words show that a conviction without a charge is in truth and in fact invalid but that it can be cured in certain cases, and when that is done, that which in truth is invalid is deemed not to be invalid because of this section. But as sections 237 and 238 expressly permit convictions in certain cases without a charge for those offences, provided there is a charge in the case to start with, the convictions so permitted cannot be invalid or even irregular because it would be wrong to say that that which the Code expressly allows is, or can be, irregular. Therefore, section 535 cannot apply to cases covered by sections 237 and 238. The result is that in these cases no question of prejudice can arise; the convictions are good, prejudice or no prejudice. Counsel replied that even if that is so, section 535 is still governed by section 233 and so cannot apply to cases in which there is no charge at all.

We do not agree with either view. In our opinion, the cases contemplated by section 237 are just as much a departure from section 233 as are those envisaged in sections 225, 226, 227, 228, 535 and 537. Sections 236, 237 and 238 deal with joinder of charges and so does section 233. The first condition is that there shall be a separate charge for each offence and the second is that each charge must be tried separately except in the cases mentioned in sections 234, 235 and 236. It is to be observed that the exceptions are confined to the rule about joinder of charges and that no exception is made to that part of the rule that requires separate charges for each offence. It will be seen that though sections 234, 235 and 236 are expressly mentioned, section 237 is not referred to, nor is section 238. Therefore, so far as section 233 is concerned, there can be no doubt that it requires a separate charge for each offence and does not envisage a situation in which there is either no charge at all or where, there being a charge for some other offence of which the accused is acquitted, he can be convicted instead of something, else for which he was not charged. We are unable to hold that the Code regards sections 237 and 238 as part of the normal procedure.

What then is the position if there is some departure from the normal procedure ? In our opinion, sections 225, 226, 227, 228, 535 and 537 furnish the answer and they apply with equal force to every kind of departure from that part of section 233 that requires a separate charge for each offence. Section 237 is only a corollary to section 236 and is there to emphasise that even when a number of charges could be joined together in the cases set out in section 236 and one or more are not put in, even then, there can be convictions in respect of those offences despite the absence of a charge or charges. But all these sections are governed by the overriding rule about prejudice mentioned in one form or another in sections 225, 226, 227, 228, 535 and 537. We think it would be monstrous to hold that a conviction cannot be set aside even when gross prejudice is proved in cases covered by section 237 just because it does not speak of prejudice. We can envisage cases where there would be grave prejudice under that section just as clearly as we can see cases where there would be none under the others.

The sort of problem that we are now examining can only arise when an express provision of the Code is violated and then the root of the matter is not whether there is violation of an express provision, for the problem postulates that there must be, nor is it whether the provision is expressed in positive or in negative terms, but what are the consequences of such disregard. Does it result in an illegality that strikes at the root of the trial and cannot be cured or is it an irregularity that is curable ?

We have used the terms "illegality" and "irregularity" because they have acquired a technical significance and are convenient to demarcate a distinction between two classes of case. They were first used by the Privy Council in N. A. Subramania Iyer v. King-Emperor ([1901] L.R. 28 I.A. 257) and repeated in Babulal Choukhani v. King-Emperor ([1938] L.R. 65 I.A. 158, 174) and in Pulukuri Kotayya v. King-Emperor ([1947] L.R. 74 I.A. 65, 75) but it is to be observed that the Code does not use the term "illegality". It refers to both classes as "irregularities"; some vitiate the proceedings (section 530) and others do not (section 529). Proceedings that come under the former head are "void". Section 535 uses the words "shall be deemed invalid" which indicate that a total omission to frame a charge would render the conviction invalid but for section 535 which serves to validate it when that sort of "irregularity" has not occasioned a "failure of justice". Section 537 does not use any of these expressions but merely says that no conviction or sentence "shall be reversed or altered" unless there has in fact been a failure of justice.

We do not attach any special significance to these terms. They are convenient expressions to convey a thought and that is all. The essence of the matter does not lie there. It is embedded in broader considerations of justice that cannot be reduced to a set formula of words or rules. It is a feeling, a way of thinking and of living that has been crystallized into judicial thought and is summed up in the admittedly vague and indefinite expression "natural justice"; something that is incapable of being reduced to a set formula of words and yet which is easily recognisable by those steeped in judicial thought and tradition. In the end, it all narrows down to this : some things are "illegal", that is to say, not curable, because the Code expressly makes them so; others are struck down by the good sense of judges who, whatever expressions they may use, do so because those things occasion prejudice and offend their sense of fair play and justice. When so struck down, the conviction is "invalid"; when not, it is good whatever the "irregularity". It matters little whether this is called an "illegality", an "irregularity that cannot be cured" or an "invalidity", so long as the terms are used in a clearly defined sense.

Turning next to the second branch of the argument about section 535. We cannot agree that because sections 237 and 238 expressly permit convictions without a charge in the cases contemplated by them, therefore they lift them out of the Chapter on Irregularities, because, if they do then so does section 232(1) in the cases with which it deals. Between them, these sections cover every kind of case in which there is an error, omission or irregularity in a charge and an omission to frame a charge, so, if sections 232(1) and 237 and 238 save departures from section 233 from being irregularities, then there is nothing left for sections 535 and 537 to operate on. In our opinion, the truth is that the Code deals with the same subject-matter under different heads, so there is some overlapping.

Sections 222 to 224 deal with the form of a charge and explain what a charge should contain. Section 225 deals with the effect of errors relating to a charge. Sections 233 to 240 deal with the joinder of charges. Sections 535 and 537 are in the Chapter that deals with irregularities generally and these two sections deal specifically with the charge and make it clear that an omission to frame a charge as well as irregularities, errors and omission in a charge are all irregularities that do not vitiate or invalidate a conviction unless there is prejudice.

But, apart from that, if we examine the learned counsel's contention more closely the fallacy in his argument becomes clear. Sections 237 and 238 deal with cases in which there is a charge to start with and then they go on to say that in certain cases the trial can proceed beyond the matter actually charged and a conviction for an offence disclosed in the evidence in the that type of case will be good despite the absence of a charge in respect of it. But what are those cases ? Only those in which

the additional charge or charges could have been framed from the start; and that is controlled by sections 234, 235 and 239 which set out the rules about joinder of charges and persons.

It is evident that if charges A and B cannot be tried together because of the prohibition in section 233 read with sections 234, 235 and 239, then no conviction could be sustained on either A or B, and if that is the case when specific charges are drawn up it is all the more so when though there is a charge in respect of A there is none in respect of B, for clearly you cannot do indirectly that which you are prohibited from doing directly.

In our opinion, sections 233 to 240 deal with joinder of charges and they must be read together and not in isolation. They all deal with the same subject-matter and set out different aspects of it. When they are read as a whole, it becomes clear that sections 237 and 238 cover every type of case in which a conviction can be sustained when there is no charge for that offence provided there is a charge to start with. They do not deal with a case in which there is no charge at all, and anything travelling beyond that when there is a charge would be hit by sections 233, 234, 235 and 239 read as a whole, for the reasons we have just given. But if that is so, and if section 535 is excluded where sections 237 and 238 apply, then what is there left for it to operate on except cases in which there is a total omission to frame a charge ? We do not think these sections should be regarded disjunctively. In our opinion, they between them (including sections 535 and 537) cover every possible case that relates to the charge and they place all failures to observe the rules about the charge in the category of curable irregularities. Chapter XIX deals comprehensively with charges and sections 535 and 537 cover every case in which there is a departure from the rules set out in that Chapter. Such departures range from errors, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. In all these cases the only question is about prejudice. We say this because the Code repeatedly says so in express and emphatic terms and because that is the foundation on which rules of procedure are based. We say it because that accords with logic and principle and reason and because it touches the deep verities on which the structure of justice is erected and maintained.

With the utmost respect we cannot read the words "by the absence of a charge" in section 232(1) and "no charge was framed" in section 535 to mean not what they would appear to mean on the face of them but "where there is a charge but none for the offence of which the accused is convicted". That would necessitate reading into the section words that are not there. We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent. We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms and that it must all be "explained to him" so that he really understands (section 271(1) in sessions trials, section 255(1) in warrant cases) but to say that a technical jargon of words whose significance no man not trained to the law can grasp or follow affords him greater protection or assistance than the informing and the explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality; and the same applies to the vast bulk of jurors who attend our courts. They are none the wiser because of a formal charge except in a vague and general way that is of no practical account. The essence of the matter is not a technical formula of words but the reality. Was he told ? Was it explained to him ? Did he understand ? Was it done in a fair way ?

We attach equal importance to other sections of the Code that are just as emphatic as section 233,

namely, sections 342 and 364; and yet no one doubts that irregularities there are curable. It is the spirit of section 271 that must be observed in a sessions trial rather than its letter and the essence of that lies in the words "and explained to him".

We do not mean to imply that laxness of procedure should be encouraged in the matter of the charge any more than this Court encourages it in matters relating to section 342; nor do we mean to suggest that a trial can be regarded as good when the accused does not know what he is being tried for and is not told and the matter is not explained to him as section 271 requires. Of course, the rules should and ought to be punctually observed. But judges and magistrates are fallible and make mistakes and the question is what is to be done in the exceptional class of case in which there has been a disregard of some express provision.

As an illustration, we give a case in which a Session Judge in a sessions trial having no charge before him from the committal court omits to frame one himself but instead, carefully and painstakingly, explains the particulars and the substance of the offence as in section 242 and complies with the spirit and object of section 271 but omits to observe its technical form. Then, when the witnesses are examined, the accused shows by his cross-examination that he knows just what he is being tried for. He is examined fully and fairly under section 342 and his answers show that he is under no delusion. He calls witnesses in defence to meet the very point of points the prosecution seek to make out against him. He puts in a written statement and is defended by an able lawyer who raises no objection from start to finish. Will a technical defect in a case like that vitiate the trial ? If the Code says Yes, then there is an end of the matter. But, in our opinion, the Code very emphatically says No; but even if that is not the case and even if the very plain and clear words of sections 232 and 535 are susceptible of two meanings, surely they should be construed so as to accord with what will best serve the ends of justice. We have put a case in which there neither is, nor can be, prejudice. Surely it would be a travesty of justice to brand a conviction in a case like that as illegal. And yet that must be done if these words that are otherwise plain are construed in a stained and unnatural manner. On the other hand, there is nothing in the view we take to imperil or harass an accused however innocent he may be. How does the technical formula of a charge afford grater protection than the "explaining" under section 271(1) and the examination under section 342 ? And yet, on the argument before us, an omission to observe these other rules that are of the substance is curable when there is no prejudice but not the sacred ritual of the framing to the charge; once that is there, the accused cannot be heard to say that he did not understand however much that may be the fact. Surely, this cannot be right.

Now, as we have said, sections 225, 232, 535 and 537(a) between them, cover every conceivable type of error irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main

facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.

In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage. If it was not, and particularly where the accused is defended by counsel [Atta Mohammad v. King-Emperor ([1929] L.R. 57 I.A. 71, 74)], it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that "no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused" [Abdul Rahman v. King-Emperor ([1926] L.R. 54 I.A. 96, 104, 110)]. But these are matters of fact which ill be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases however alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even judges, are sometimes prone to argue and to act if there were.

Endeavour was made in the argument to draw a distinction between cases falling under section 34 of the Indian Penal Code and those under section 149 of the Indian Penal Code. It was contended that even if no separate charge is necessary when section 34 is called in aid because section 34 does not create a separate offence, one is essential for a conviction under section 149 and that there, at any rate, the absence of a separate charge is fatal.

This is not a case under section 149 of the Indian Penal Code so the question does not really arise but it is necessary to advert to the argument because, on the view we take of sections 225, 535 and 537, it is immaterial what the offence is and whether there is a charge at all. The only question is whether the irregularity occasioned prejudice.

We now turn to an examination of the cases of this Court that are said to give rise to a conflict of view. In our opinion, there is in reality no conflict and though the language used in one case might suggest that, a close consideration of its reasons will disclose that there was in fact no difference of view in the type of case where there is a charge to start with. None of the cases deals with the position where there is no charge at all.

The following cases afford no difficulty because they directly accord with the view we have set out at length above. In Lachman Singh v. The State ([1952] S.C.R. 839, 848) it was held that when there is a charge under section 302 of the Indian Penal Code read with section 149 and the charge under section 149 disappears because of the acquittal of some of the accused, a conviction under section 302 of the Indian Penal Code read with section 34 is good even though there is no separate charge under section 302 read with section 34, provided the accused could have been so charged on the facts of the case. The decision in Karnail Singh v. The State of Punjab ([1954] S.C.R. 904, 911) is to the same effect and the question about prejudice was also considered.

Pandurang, Tukia and Bhillia v. State of Hyderabad ([1955] 1 S.C.R. 1083) also presents no difficulty because though the point was taken in that case it was expressly left open at page 1093.

From there we come to Suraj Pal v. The State of U.P. ([1955] 1 S.C.R. 1332) That was a case in which a number of accused were charged under sections 307/149 and sections 302/149 of the Indian Penal Code. It was found that there was no common object to kill, so all the accused were acquitted under section 149. But the evidence disclosed that the appellant had himself made an attempt on the life of one man and had himself shot another dead. Accordingly, the High Court convicted him under sections 307 and 302 of the Indian Penal Code respectively, though there was no separate charge under either of those sections. Those convictions were challenged here. This Court held that the omission to frame a charge is a serious lacuna but despite that the real question is whether that caused prejudice. The learned Judges then proceeded to determine the question of prejudice on the facts of that case. The conclusion reached on the facts was that prejudice was disclosed, so an acquittal was ordered.

It was argued before us that the ground of the decision there was that the absence of charges under sections 307 and 302 simpliciter was in itself conclusive to establish prejudice and that therefore one need go no further. It is enough to say that that was not the decision and though that was one of the matters taken into consideration, the conclusion was based on a careful and lengthy investigation of all the facts in the case including the way in which it was conducted, the evidence of several witnesses, the medical evidence, the first information report and certain documents including two filed by the accused.

Next comes Nanak Chand v. The State of Punjab ([1955] 1 S.C.R. 1201). That was also a case in which the charge was under section 302/149 of the Indian Penal Code with the conviction under section 302 simpliciter without any separate charge under that section. The Sessions Judge had convicted under section 302/34 of the Indian Penal Code holding that the charge of rioting was not proved. The High Court held that no common intention was proved either but as the evidence indicated that the appellant had done the actual killing he was convicted under section 302.

Now it is true that there are observations there which, without close examination, would appear to support the learned counsel for the appellant. But those observations must be construed in the light of the facts found, the most crucial fact being that patent prejudice was disclosed. It was found that the appellant there was in fact misled in his defence and one of the factors taken into consideration, as indeed must always be the case, was that when he was told that he was to be tried under section 302 read with section 149 of the Indian Penal Code that indicated to him that he was not being tried for a murder committed by him personally but that he was only being made vicariously liable for an act that another had done in prosecution of the common object of an unlawful assembly of which he was a member. But that was only one of the matters considered and it does not follow that every accused will be so misled. It all depends on the circumstances. The entire evidence and facts on which the learned Judges founded are not set out in the judgment but there is enough to indicate that had the appellant's attention been drawn to his own part in the actual killing he would probably have cross-examined the doctor with more care and there was enough in the medical evidence to show that had that had been done the appellant might well have been exonerated. As judges of fact they were entitled, and indeed bound, to give the accused the benefit of every reasonable doubt and so were justified in reaching their conclusion on the facts of that case. Illustrations (c) and (e) to section 225 of the Criminal Procedure Code show that what the accused did or omitted to do in defence are relevant on the question of prejudice. If the Court finds that a vital witness was not cross-examined when he might have been, and that if he had been, the further facts elicited might

well have been crucial, then material from which prejudice can be inferred is at once apparent : that is exactly Illustrations (c) and (e). That, however, was, and remains, a pure conclusion of fact resting on the evidence and circumstances of that particular case. The decision was special to the facts of that case and no decision on facts can ever be used as a guide for a conclusion on facts in another case.

Now having reached the conclusion that there was prejudice, the learned Judges were of the opinion that the irregularity, if it can be so called when prejudice is disclosed, was incurable and from that they concluded that an incurable irregularity is nothing but an illegality : a perfectly possible and logical conclusion when the words "irregularity" and "illegality" are not defined. As we have already said, section 535 of the Criminal Procedure Code says that no finding or sentence "shall be deemed to be invalid" unless etc. and it can well be argued from this that this indicates that an omission to follow the provisions of the Code does in truth and in fact render the decision invalid but because of section 535 that which is in truth and in fact invalid must be deemed to be valid unless prejudice is disclosed. As there was prejudice in that case, the decision was invalid and being invalid it was illegal. We do not say that that is necessarily so but it is a reasonably plausible conclusion and was what the learned Judges had in mind.

It is to be observed that section 535 of the Code is mandatory in its terms, just as mandatory as section 233. If it be accepted that an absence of a charge would, but for its provisions, render a conviction invalid, this section cures such an invalidity when there is in fact, not in theory but in fact, no failure of justice. The section is just as mandatory as section 233 and we can see no justification for giving it less weight than section 237. If section 237 validates a departure from section 233 and saves it from the stigma of an irregularity, then so does section 535, for it says very expressly that no conviction shall be deemed invalid merely on the ground that no charge was framed unless that in fact occasioned a failure of justice; and if section 535 is held not to apply to cases covered by sections 237 and 238, then it must apply to cases that lie outside the scope of those sections and the only kind of case left is a case in which there is a total absence of a charge, for any other type of case would be excluded because of misjoinder. If section 233 is mandatory, that part of it which prohibits misjoinder except in the cases mentioned in sections 234, 235, 236 and 239 is just as mandatory as the portion that requires a separate charge for each offence. It is unfortunate that we have no definition of the terms "illegality", "irregularity" and "invalidity" because they can be used in differing senses, but however that may be, the decision we are now examining and the remarks made in that case must be read in the light of this background. We agree that some of the expressions used in the judgment appear to travel wider than this but in order to dispel misconception we would now hold that the true view is the one we have propounded at length in the present judgment.

We now turn to the question of fact : is there material in this case to justify a finding of prejudice ? that will turn largely on the differences between section 302 of the Indian Penal Code and section 302 read with section 34 of the Indian Penal Code and on the measure of criminal liability to which the appellant would be exposed in those two cases; and here again, the matter must be viewed broadly and not in any technical or pettifogging way.

Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that ? All he is entitled to get from the charge is -

(1) the offence with which he is charged, section 221(1), Criminal Procedure Code,

(2) the law and section of the law against which the offence is said to have been committed, section 221(4),

(3) particulars of the time, section 222(1), and

(4) of the place, section 222(1), and

(5) of the person against whom the offence is said to have been committed, section 222(1), and

(6) when the nature of the case is such that those particulars do not give him sufficient notice of the matter with which he is charged, such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, section 223.

He is not entitled to any further information in the charge : see Illustration (e) to section 223 of the Code.

"A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B".

It is clear from this that when the case is one of murder, the accused is not entitled to be told in the charge how it was committed, whether with a pistol or a lathi or a sword. He is not entitled to know from the charge simpliciter any further circumstance. How then is he expected to defend himself ? He has the police challan, he has the evidence recorded in the Committal Court, he hears the prosecution witnesses and he is examined under section 342 of the Code. It is these proceedings that furnish him with all the necessary, and indeed vital, information, and it is his duty to look into them and defend himself. It will be seen that if the logic of the appellant's contention is carried to its fullest extent the accused could complain of prejudice because he was not told in the charge whether a pistol was used for the crime or a sword and if a pistol, its calibre and bore and the type of cartridge.

Now when several persons join in the commission of a crime and share a common intention, it means that each has the requisite intention in himself; the fact that others share it does not absolve any one of them individually, and when the crime is actually committed in pursuance of the common intention and the accused is present at its commission, the crime becomes the offence actually committed because of section 114 of the Indian Penal Code. Section 114 does not create the offence nor does section 34. These sections enunciate a principle of criminal liability. Therefore, in such cases all that the charge need set out is the offence of murder punishable under section 302 of the Indian Penal Code committed by the accused with another and the accused is left to gather the details of the occurrence as alleged by the prosecution from other sources. The fact that he is told that he is charged with murder committed by himself with another imports that every legal condition required by law to constitute the offence of murder committed in this way was fulfilled : section 221(5) of the Criminal Procedure Code.

Now what are those legal conditions ? What is the effect of charging two persons with a murder committed in pursuance of a common intention ? It means that the accused is unmistakably told that he participated in the crime; exactly how is no more a matter for the charge that it is to set out the circumstances in which the murder was committed. It also means that he is informed that it is immaterial who struck the fatal blow. The charges here against the appellant and his brother Ronnie

are identical. As there was only one fatal blow and as only one person could have inflicted it and as both are charged in this way, it can only mean that each is put on his guard and made to realise that the prosecution allege that one of the two was responsible for that and which must be discovered from the evidence and not from the charge, just as surely as it must when the question turns on who possessed or used a pistol and who a sword.

It is true that if it cannot be ascertained who struck the fatal blow, then the accused cannot be convicted unless the common intention is proved and in that type of case an acquittal of the co-accused may be fatal to the prosecution. But the converse does not hold good, and if the part that the accused played can be clearly brought home to him and if it is sufficient to convict him of murder simpliciter he cannot escape liability because of the charge unless he can show prejudice.

Put at its highest, all that the appellant can urge is that a charge in the alternative ought to have been framed, which in itself imports that it could have been so framed. As was said by the Privy Council in Begu v. King-Emperor ([1925] I.L.R. 6 Lah. 226, 231) and also by this Court in Lachman Singh v. The State ([1952] S.C.R. 839, 848) -

> "A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here..... They were not charged with that formally, but they were tried on evidence which brings the case under section 237" ([1925] I.L.R. 6 Lah. 226, 231).

The variation between murder and concealing evidence after the crime is no more than the variation between killing a man jointly with another, sharing his intention, or allowing the other to do the actual killing with the same common intention.

Now what do the proceedings in this case show ? The police charge-sheet states that the appellant hit the deceased with a hockey stick his brother only threw stones. From there we go to his examination under section 342 of the Criminal Procedure Code in the Committal Court. He is specifically told that the only eyewitness in the case accuses him and not his brother of having hit the deceased over the head with a hockey stick. No one could misunderstand that. In the Sessions Court we find the same evidence repeated. No witness suggests that anyone else hit the deceased on the head. There was no possibility of misunderstanding or mistake. The fact that the appellant did not attempt to confront any of the witnesses with their statements before either the Committing Magistrate or the police on this point shows that the witnesses told a consistent story from the start. Next, the appellant was examined under section 342 in the Sessions Court and was asked the same questions and was confronted in his examination with the same eyewitness. He was told clearly and unambiguously that the evidence was that he hit the deceased over the head.

Now what was his defence ? A curious procedure was adopted, a procedure that has been condemned by the Nagpur High Court in other cases and which we regret to see still persists. Instead of the accused speaking for himself he made a statement through his advocate. However, the defence was this :

> (1) an alibi : "I wasn't there".
>
> (2) It was dark and the deceased rushed at the appellant (who is now said to have been there despite the alibi), fell down the stairs and broke his head;

(3) The deceased was the aggressor and the appellant struck him in self defence.

There is no suggestion here that the other accused hit the deceased or that anyone other than the appellant did. The appellant places it beyond doubt that the knew that the case against him was that he is said to have struck the fatal blow.

Next, what was the cross-examination of the only eyewitness ? There was no suggestion that she was mistaken in her identity, whereas she was cross-examined about this very matter of self defence and questions were put to show that the deceased and not his brother had threatened the appellant with his first.

In the High Court the plea of alibi was dropped and the only argument advanced was self defence. There was no hint of prejudice even in the grounds of appeal. There was no pretence in the arguments that the appellant did not know he was being accused of having hit the deceased. On the contrary, there was a clear admission in the High Court that he did hit the man but that he acted in self defence.

As the appellant knew that the case against him was that he is the one who is said to have struck the fatal blow, and as he was told in the charge that the offence he is said to have committed was that of murder and was informed of the date and place and person, we find it impossible to infer prejudice. As the Privy Council said in Atta Mohammad v. Emperor ([1929] L.R. 57 I.A. 71, 74)-

> "He appeared by an advocate on the appeal and had been legally defended at the trial, and it is as clear as possible that, with full knowledge of the course which the trial had taken, neither the appellant himself not those who represented him had any sense whatever of the injustice that is now urged or any idea of his having been deprived of the opportunity of knowing the charge on which he was tried or of raising defences appropriate to that charge".

We would hold that there was no prejudice and that the conviction is not invalid because of the nature of the charge.

We now come to the merits, and the question is whether this is a case under section 302 or under the second part of section 304 of the Indian Penal Code. The injury was inflicted with a hockey stick. The head was fractured but the deceased lived for ten days. The doctor says -

> "I consider the head injury on the head of Smythe was of a very serious nature and was likely to result in fatal consequences".

Therefore, the doctor in whose care the patient was till he died places the injury no higher then "likely" to cause death.

The learned Sessions Judge exonerated the appellant of any intention to kill and the learned High Court Judges say that they agree with his findings. If there was no intention to kill, then it can be murder only if

> (1) the accused knew that the injury inflicted would be likely to cause death or
>
> (2) that it would be sufficient in the ordinary course of nature to cause death or

(3) that the accused knew that the act must in all probability cause death.

If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under the second part of section 304 of the Indian Penal Code.

The doctor thought that it was only likely to cause death. The appellant is only 22 years old and not a doctor and can hardly be presumed to have had this special knowledge at the time he struck the blow. All blows on the head do not necessarily cause death, and as the deceased lived for ten days, we are unable to deduce from the nature of the injury and from the mere fact of death that the appellant had, or should have had, the special knowledge that section 300 of the Indian Penal Code requires. Admittedly, there was no premeditation and there was sudden fight, so we are unable to ascribe the necessary knowledge to the appellant; nor was the injury sufficient in the ordinary course of nature to cause death. So the offence falls under the second part of section 304 of the Indian Penal Code.

On the question of sentence. There was no enmity accordingly to the finding of the learned Sessions Judge. The appellant did not go there armed with a stick. He was in love with the deceased's sister who reciprocated his affection but could not marry him because her husband had turned her out in England and she had no divorce. The deceased, who was the girl's brother, resented this. The appellant went to the house and asked the sister to come down. The brother came instead and there was a quarrel. The appellant slapped the deceased across the face. The deceased, who was a big and strong man, shook his first in the appellant's face and the appellant snatched a hockey stick from his younger brother Ronnie and hit the deceased one blow over the head and two blows on the hips. In the circumstances, we think five years' rigorous imprisonment will suffice.

We would acquit the appellant on the charge of murder and alter the conviction to one under the second part of section 304 of the Indian Penal Code and reduce the sentence to one of five years' rigorous imprisonment.

CHANDRASEKHARA AIYAR J. ◆

This appeal comes before us on a reference owing to a conflict between two decisions of this Court, Nanak Chand v. The State of Punjab ([1955] 1 S.C.R. 1201) and Suraj Pal v. The State of U.P. ([1955] 1 S.C.R. 1332)

Where there is a charge against an accused under section 302, read with section 149, if section 149 of the Indian Penal Code is inapplicable to the facts, can the accused be convicted under section 302 without a separate charge ? In the first case, it was held that the omission to have a specific charge under section 302 amounted to an illegality. In the latter case, the view was taken that it was a mere irregularity, curable if no prejudice was caused to the accused.

Section 149 creates a specific offence and without applying its provisions a member of an unlawful assembly could not be made liable for the offence committed not by him but by another member of that assembly. Therefore the case is not similar to the one where there is a charge under section 302, read with section 34 of the Indian Penal Code. When section 149 is ruled out, the liability for murder ceases to be constructive; it becomes direct and there must be a separate charge therefor under section 302 of the Indian Penal Code. This was the line of reasoning in Nanak Chand's case. In Suraj Pal's case, the same line is taken but the absence of a specific charge is treated as a serious

lacuna merely; and not regarded as an illegality.

This conflict does not arise in the case before us where the offence charged against two brothers, William and Ronnie for the murder of Donald was under section 302, read with section 34 of the Indian Penal Code. Ronnie was acquitted. But William was found guilty and sentenced to transportation for life. As pointed out by Lord Sumner in his classic judgment in Barendra Kumar Ghosh v. The King-Emperor ([1924] L.R. 52 I.A. 40), there is much difference in the scope and applicability of sections 34 and 149, though they have some resemblance and are to some extent overlapping. The two sections are again compared and contrasted in Karnail Singh and another v. The State of Punjab ([1954] S.C.R. 904). Section 34 does not by itself create any offence, whereas it has been held that section 149 does. In a charge under section 34, there is active participation in the commission of the criminal act; under section 149, the liability arise by reason of the membership of the unlawful assembly with a common object, and there may be no active participation at all in the perpetration or commission of the crime. The overlapping arises in those cases where two or more persons commit a murder in furtherance of the common intention, but it is not possible to say which of them was responsible for the fatal injury, or whether any one injury by itself was responsible for the death. There may also be a case where it is known that out of the assailants one in particular was responsible for the fatal injury and the others are sought to be made liable for the result owing to the common intention involved. But whereas in this case, the appellant has been individually charged with murder and there is proof that his hand caused the injury, the fact that his brother was also sought to be made liable owing to the existence of a common intention, is neither here nor there, so far as the legality of the conviction is concerned, as there has been no prejudice by way of failure of justice.

It is, however, necessary having regard to the lengthy arguments addressed to us, to consider the main question arising on the reference. Though the two cases which gave rise to this reference were cases relating to section 149 of the Indian Penal Code and not to section 34 of the Indian Penal Code, as the present case is, the order of reference was occasioned by the fact that in Nanak Chand's case it was stated specifically that the parallel case under section 34 also stood on the same footing. In our attempt to resolve the conflict, we covered a wide area of sections and decisions. A detailed discussion of all the decisions cited at the Bar is not of much use as it is not possible to gather from a study of those cases anything very decisive by way of any guiding principle. But a few of them, more important than the rest, must be noticed.

The Criminal Procedure Code does not use the word "illegality". Even defects or violations that vitiate the proceedings and render them void are spoken of only as irregularities in section 530. The word illegality was used almost for the first time in the judgment of the Privy Council, L.R. 28 Indian Appeals 257 (familiarly known as Subramania Aiyar's case), where they speak of a contravention of section 234 of the Code, resulting in a misjoinder of charges, as an illegality. The idea that it was a mere irregularity was repelled in these words :-

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time, and those offences being spread over a longer period than by law could have been joined together in one indictment. The illustration of the section itself sufficiently shows what was meant".

Again, they say :-

> "..... it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity".

Subsequently, however, there have been systematic attempts to explain away the said decision and restrict its scope to narrow limits. This was possibly because it was realised even by the Judicial Committee itself that the view taken by them to the effect that a violation of the mandatory provisions of the Code would be an illegality was rather an extreme one. It may be pointed out that even in that case the question of prejudice was not entirely absent from their Lordships' minds. Both sides referred to it in the course of the arguments, and the Lord Chancellor alludes to the prejudice inherent in the trial on a multitude of charges. In passing, it may be mentioned here that the legislature has now specifically included misjoinder of charges in sub-clause (b) of section 537. The exact effect of this inclusion may require consideration in an appropriate case.

Before dealing with the other relevant sections of the Code, let us examine some of the later decisions of the Privy Council which seem to indicate a swing of the pendulum to the other side. In Abdul Rahman v. The King-Emperor ([1926] L.R. 54 I.A. 96), there was a violation of section 360 of the Code with provides that the deposition of each witness shall be read over to him in the presence of the accused or his pleader. The High Court held that this was a mere irregularity, and confirmed the conviction as no failure of justice had resulted. It was contended on appeal before the Privy Council that the section was obligatory, and that non-compliance with such a mandatory provision was illegal, on the principle laid down in Subramania Aiyar's case ([1901] L.R. 28 I.A. 257). But their Lordships rejected this contention pointing out that in the earlier case the procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused; and they confirmed the conviction. The question was again raised in Babulal Choukhani v. The King-Emperor ([1938] 65 I.A. 158) as to what would be an illegality as distinguished from an irregularity. Lord Wright who delivered the judgment of the Board assumed that an infringement of section 239(b) of the Code would be an illegality, and proceeded to state that the question did not, however, arise, and it was hence unnecessary to discuss the precise scope of what was decided in Subramania Aiyar's case ([1901] L.R. 28 I.A. 257). The matter cropped up once again in Pulukuri Kotayya and others v. King-Emperor ([1947] L.R. 74 I.A. 65) where there was a breach of the statutory requirement found in section 162 of the Code, inasmuch as the accused were not supplied with copies of the statements first recorded by a police officer for cross-examining the prosecution witnesses. The defect was recognized to be a matter of gravity, and if the statements had been completely destroyed, or if there had been a total refusal to supply copies to the accused, the convictions were liable to be quashed. But in the case before them, as the statements were made available, though too late to be effective, and the Circle Inspector's notes of the examination of witnesses were put into the hands of the accused, it was taken to be an irregularity merely. Referring to the contention that the breach of a direct and important provision of the Code cannot be cured but must lead to the quashing of the conviction, Sir John Beaumont observed :-

> "..... In their Lordships' opinion, this argument is based on too narrow a view of the operation of section 537. When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subramania Iyer's case ([1901] L.R. 28 I.A. 257)), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under

> section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in Abdul Rahman v. The King-Emperor ([1926] L.R. 54 I.A. 96) where failure to comply with section 360 of the Code of Criminal Procedure was held to be cured by sections 535 and 537. The present case falls under section 537, and their Lordships hold the trial valid notwithstanding the breach of section 162".

Of course, lack of competency of jurisdiction, absence of a complaint by the proper person or authority specified, want of sanction prescribed as a condition precedent for a prosecution, in short, defects that strike at the very root of jurisdiction stand on a separate footing, and the proceedings taken in disregard or disobedience would be illegal. The difficulty arises only when we have to consider the other provisions in the Code which regulate procedure and which are found in a mandatory form, positive or negative. It is in this class of cases that the distinction becomes important and material. The scope of the decision in Subramania Aiyar's case ([1901] L.R. 28 I.A. 257) has become so circumscribed that it is doubtful if it applies to the generality of cases of omissions and defects that come before the courts, excepting where they bring about the result that the trial was conducted in a manner different from that prescribed by the Code.

Let us now turn our attention to the relevant sections of the Code bearing on the requirement of a charge, the omission of a charge and the effect thereof. Section 233 provides as follows :-

> "For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239".

A power to alter or add to a charge, at any time before judgment is pronounced, is conferred on a court under section 227. Sections 228 to 231 provide for the steps to be taken consequent on such alteration. Section 225 shows what would be the effect of any errors in the framing of a charge. It runs as follows :-

> "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice". Section 232(1) of the Code of Criminal Procedure refers more specifically to the effect of such error where an appellate Court or the High Court in revision or in confirmation proceedings, notices such an error and is in the following terms :-
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> "If any Appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in 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". Then we have section 237, dealing with a case where an accused charged with one offence for which he might have been charged under the provisions of section 236 could be convicted of a different offence. This applies only to cases where it is doubtful which of several offences the facts which can be proved will

constitute. Begu's case ([1925] L.R. 52 I.A. 191) is an example; the conviction was under section 201 of the Indian Penal Code for causing the disappearance of evidence relating to a murder, though the charge was under section 302 of the Indian Penal Code. Viscount Haldane observes :-

"..... A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under section 237".

Finally, we come to sections 535 and 537 of the Code. The former is in these terms :-

"(1) 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.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge". The latter runs thus :-

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account -

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

#(b).....##

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice".

A case of complete absence of a charge is covered by section 535, whereas an error or omission in a charge is dealt with by section 537. The consequences seem to be slightly different. Where there is no charge, it is for the court to determine whether there is any failure of justice. But in the latter, where there is mere error or omission in the charge, the court is also bound to have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

The sections referred to indicate that in the generality of cases the omission to frame a charge is not per se fatal. We are unable, therefore, to accept as sound the very broad proposition advanced for the appellants by Mr. Umrigar that where there is no charge, the conviction would be illegal, prejudice or no prejudice. On the other hand, it is suggested that the wording of section 535 of the Code of Criminal Procedure is sufficiently wide to cover every case of 'no charge'. It is said that it

applies also to the case of a trial in which there has been no charge of any kind even from the very outset. We are unable to agree that section 535 of the Code of the Criminal Procedure is to be construed in such an unlimited sense. It may be noticed that this group of sections relating to absence of a charge, namely, sections 225, 226 and 232 and the powers exercisable thereunder, are with reference to a trial which has already commenced or taken place. They would, therefore, normally relate to errors or omissions which occur in a trial that has validly commenced. There is no reason to think that section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where, a trial which proceeds without any kind of charge at the outset can be said to be a trial wholly contrary to what is prescribed by the Code. In such case the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration the following classes of cases may be mentioned :- (a) Where there is no charge at all as required by the Code from start to finish - from the Committing Magistrate's court to the end of the Sessions trial; the Code contemplates in section 226 the possibility of a committal without any charge and it is not impossible to conceive of an extreme case where the Sessions trial also proceeds without any formal charge which has to be in writing and read out and explained to the accused (section 210(2) and section 251(A)(4) and section 227). The Code requires that there should be a charge and it should be in writing. A deliberate breach of this basic requirement cannot be cured by the assertion that everything was orally explained to the accused and the assessors or jurors, and there was no possible or probable prejudice. (b) Where the conviction is for a totally different offence from the one charged and not covered by sections 236 and 237 of the Code. On a charge for a minor offence, there can be no conviction for a major offence, e.g., grievous hurt or rioting and murder. The omission to frame a separate and specific charge in such cases will be an incurable irregularity amounting to an illegality.

Sections 34, 114 and 149 of the Indian Penal Code provide for criminal liability viewed from different angles as regards actual participants, accessories and men actuated by a common object or a common intention; and the charge is a rolled-up one involving the direct liability and the constructive liability without specifying who are directly liable and who are sought to be made constructively liable. In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. In most of the cases of this kind, evidence is normally given from the outset as to who was primarily responsible for the act which brought about the offence and such evidence is of course relevant.

After all, in our considering whether the defect is illegal or merely irregular, we shall have to take into account several factors, such as the form and the language of the mandatory provisions, the scheme and the object to be achieved, the nature of the violation etc. Dealing with the question whether a provision in a statue is mandatory or directly, Lord Penzance observed in Howard v. Bodington ([1877] 2 P.D. 203). "There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would taken an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follows must come to an end". These words can be applied mutatis mutandis to cases where there is no charge at all. The gravity of the defect will have to be considered to determine if it falls within one class or the other. Is it a mere unimportant mistake in procedure or is it substantial and vital ? The answer will depend largely on the facts and circumstances of each case. If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If

the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established.

This judgment should not be understood by the subordinate courts as sanctioning a deliberate disobedience to the mandatory requirements of the Code, or as giving any license to proceed with trials without an appropriate charge. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted. In the main, the provisions of section 535 would apply to cases of inadvertence to frame a charge induced by the belief that the matter on record is sufficient to warrant the conviction for a particular offence without express specification, and where the facts proved by the prosecution constitute a separate and distinct offence but closely relevant to and springing out of the same set of facts connected with the one charged.

Coming now to the facts of the present case; William was on terms of intimacy with Beryl P.W. 13. She was the sister of Donald Smythe. The accused was practically living with her in her house. The brother did not like their intimacy and was making attempts to separate Beryl from the accused. On the evening of the day of the occurrence, Donald and his mother went to Beryl's house. There was a quarrel between them and the accused was asked to get away. He left the place but returned a little later with his brother (Ronnie) and asked Beryl who was on the first floor to come down to him. She did not come but Donald came down into the courtyard. There was a heated exchange of words. The accused slapped Donald on the cheek. Donald lifted his fist. The accused gave one blow on his head with a hockey stick with the result that this skull was fractured. Donald died in the hospital ten days later. A plea of alibi was given up in the High Court. The suggestion that Donald fell down and sustained the head injury while descending the stairs was ruled out by the evidence of the eye-witnesses. Nothing was established to justify any exercise of the right of private defence.

On these facts, which have been proved, the only question that arises is whether the appellant is guilty of murder under section 302 of the Indian Penal Code, or guilty only of culpable homicide, not amounting to murder, under the second part of section 304. The High Court did not address itself to the nature of the offence. It is obvious that the appellant did not intend to kill the deceased. The evidence of the doctor is that the injury was likely to result in fatal consequences. This by itself is not enough to bring the case within the scope of section 300. There is nothing to warrant us to attribute to the appellant knowledge that the injury was liable to cause death or that it was so imminently dangerous that it must in all probability cause death. The fact that Donald lived for ten days afterwards shows that it was not sufficient in the ordinary course of nature to cause death. The elements specified in section 300 of the Indian Penal Code are thus wanting. We take the view, considering all the circumstances that the offence is the lesser one.

The appellant is acquitted of the charge of murder but is convicted under the second part of section 304, and sentenced to five years' rigorous imprisonment.

IMAM J. ◆

I agree with the judgment just delivered by my learned brother, Chandrasekhara Aiyar, J. but would add some observations of my own as I was party to the judgment of this Court in Nanak Chand's case.

The appellant was charged with murder and nothing short of it, although it was stated in the charge

that the offence was committed by him in furtherance of a common intention. If the evidence failed to prove that the offence committed by him was in furtherance of a common intention, it would be nonetheless his offence, namely, murder, if his act in law amounted to murder. The law does not require in such a case that a separate charge for murder should be framed, because the charge of murder was already on the record.

Strictly speaking, on the facts of the present case, the question raised by the reference does not arise. Since it has been raised, it must be considered. In Nanak Chand's case the view taken was that when an accused is charged under section 302 read with section 149 of the Indian Penal Code, it is illegal to convict him under section 302 of the Indian Penal Code without a charge having been framed against him under that section. It was also held that if this was only an irregularity then on the facts of the case, the accused was misled in his defence. In Suraj Pal's case, in similar circumstances it was held that failure to frame a charge under section 302 was a serious lacuna and the conviction was set aside on the ground that the accused had been prejudiced. A careful examination of these two cases does not reveal any substantial conflict between them.

As I understand the provisions of the Code of Criminal Procedure, a separate procedure is set out for various class of cases triable by a court exercising powers under the Code. So far as the framing of a charge is concerned, the Code expressly states the kind of cases in which no charge is to be framed. In trial of warrant cases, cases before a Court of Sessions and a High Court, a charge must be framed. Failure to frame a charge in such cases would be a contravention of the mandatory provisions of the Code. Would such contravention amount to an illegality ? Prima facie a conviction of an accused person for an offence with which he had not been charged but for which he ought to have been charged, is invalid. It is said that by virtue of the provisions of sections 535 and 537 of the Code failure to frame a charge or an omission or irregularity in a charge, which is framed, does not by itself invalidate the conviction, unless the Court is satisfied that in fact a failure of justice has resulted. It is, therefore, necessary to examine how far these provisions, of the Code override its provisions relating to the framing of charges.

Section 233 of the Code expressly states that for every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. There is no ambiguity in the language of this section. While it insists upon a separate charge for every distinct offence it permits a single trial on several charges in the cases mentioned in sections 234, 235, 236 and 239. Section 233 is a mandatory provision and the force of its direction is not weakened by the fact that another provision of the Code does permit a conviction of an accused for an offence with which he had not been charged. In such a case no question of illegality or irregularity arises, as the conviction is expressly authorized by the Code. The conviction is valid because of the statute itself and not because of section 535.

The framing of a charge in trial of cases in which a charge is required to be framed, is one of the important elements in the mode of a trial. On the charge framed, after it has been explained to the accused, the plea of guilty or not guilty is recorded. If the accused pleads guilty, certain consequences follow. If he pleads not guilty, the trial must proceed according to law. When a charge is not framed, obviously no plea of the accused with reference to it is taken and the trial has proceeded without such a plea. Is the framing of a charge and the recording of the plea of the accused merely a ritual or a fundamental provision of the Code concerning procedure in a criminal trial ? I think it is the latter. Are the express provisions of the Code as to the manner in which a trial is to proceed to be ignored, or considered as satisfied, merely because the Court explained to the

accused as to what he was being tried for ? I apprehend not. For to do so is to replace the provisions of the Code by a procedure unwarranted by the statute itself. In my opinion, a total absence of a charge from start to finish in a case where the law requires a charge to be framed, is a contravention of the provisions of the Code as to the mode of trial and a conviction of the accused of an offence in such a case is invalid and the question of prejudice does not arise. None of the decisions of the Privy Council suggest that in such a case the conviction will be deemed to be valid by virtue of the provisions of section 535, unless the Court is satisfied that there has been a failure of justice.

In cases where a charge has been framed and there is an omission or irregularity in it, it is difficult to see how the mode of trial is affected. In any event, the Code expressly provides that in such cases the conviction need not be set aside, unless, in fact, a failure of justice has resulted.

Under the provisions of section 232 of the Code an appellate Court or a High Court exercising its powers of revision or its powers under Chapter XXVII, must direct a new trial of a case in which an accused person has been convicted of an offence with which he had not been charred, if it is satisfied that he had been misled in his defence by the absence of a charge. In such a case a court is bound to act according to its provisions. But this does not mean that by virtue of these provisions that which was invalid shall be deemed to be valid, unless, prejudice was shown. It is the provision of section 535 to which reference must be made in order to ascertain whether that which was invalid shall be deemed to be valid, unless the court was satisfied that there had been a failure of justice. I regard with concern, if not with dismay, a too liberal application of its provisions to all cases in which there is an absence of a charge, although a charge ought to have been framed. It is difficult to lay down any hard and fast rule as to when the provisions of section 535 will or will not be applicable. The facts of each of case, as they arise, will have to be carefully considered in order to decide that that which was prima facie invalid is deemed to be valid by virtue of its provisions. There may be cases where the omission to frame a charge was merely a technical defect in which case section 535 would apply. On the other hand, there may be cases where failure to frame a charge affects the mode of trial or it is such a substantial contravention of the provisions of the Code relating to the framing of charges that prejudice may be inferred at once and the conviction which was prima facie invalid continued to be so. In a criminal trial innocence of an accused is presumed, unless there is a statutory presumption against him, and the prosecution must prove that the accused is guilty of the offence for which he is being tried. The prosecution is in possession of all the evidence upon which it relies to establish its case against the accused. It has the privilege to ask the Court to frame charges with respect to the offences which it wishes to establish against the accused. On the Court itself a duty is cast to frame charges for offences which, on the evidence, appear to it prima facie to have been committed. If in spite of this a charge under section 302 read with 149 of the Indian Penal Code only is framed against an accused person and not under section 302 of the Indian Penal Code, it will be reasonable to suppose that neither the prosecution nor the Court considered the evidence sufficient to prove that murder was committed by the accused and the omission to frame a charge under section 302 must be regarded as a deliberate act of the Court by way of notice to the accused that he was not being tried for that offence. It would not be a case of mere omission to frame a charge. If, therefore, the accused is convicted under section 302, I would consider his conviction as invalid, as he was misled in his defence.

In conclusion I would point out that the provisions of the Code of Criminal Procedure are meant to be obeyed. Contravention of its provisions are unnecessary and neither the prosecution nor the Courts of trial should ignore its provisions in the hope that they might find shelter under sections 535 and 537 of the Code. Where the contravention is substantial and a retrial becomes necessary, public time is wasted and the accused is put to unnecessary harassment and expense.

I agree that the appellant's conviction be altered from section 302 of the Indian Penal Code to 304 of the Indian Penal Code and that he be sentenced to five years' rigorous imprisonment.

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