Sundar Singh And Ors. vs The State on 15 November, 1954

Equivalent citations: AIR1955ALL232, 1955CRILJ898, AIR 1955 ALLAHABAD 232

JUDGMENT

Malik, C.J.

1. I have read the judgment of my brother Mukerji. Criminal Revision No. 27 of 1953 came up before nay brother Brij Mohan Lall. He referred the case to a Bench as the question had been frequently mooted before him whether if X is found to be a member of an unlawful assembly which assembly has committed an offence punishable under Section 323, he could be convicted and sentenced both under Section 147 and Section 323/149, Penal Code, if it had transpired that the prosecution had failed to prove that X himself caused the hurt with his own hands. There was a decision of my brother Brij Mohan Lall J. in -- 'Tiny v. State', AIR 1952 All 92 (A), where it was held that X could be so convicted, while there was a later decision by my brother Kidwai J. in -- 'Abdur Rashid Khan v. The State', AIRule 1953 All 315 (B) where he had taken a contrary view. The case came up before Mr. Justice Agarwala and myself and for the reasons given in the referring order we thought it necessary that the case should go before a Full Bench. Criminal Revision No. 239 of 1953 was connected with it as the same question of law arose in that case also. Since both these cases were referred by me to a Full Bench I would like to state briefly my opinion on the questions of law raised.

2. I agree with my brother Mukerji that Section 149, Penal Code, does not create a new offence but makes a member of an unlawful assembly vicariously liable for offences committed by others in furtherance of the common object.

3. As my learned brother has pointed out 'force' is defined in Section 349, Penal Code, but every force used against a human being need not necessarily result in 'hurt'. 'Hurt' is denned in Section 319 as 'bodily pain, disease or infirmity' caused to a person. In Section 146 two words have been used, 'force' or 'violence', and the section provides that "Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting." While the word 'force' has been denned in Section 349, the word 'violence' has not been defined in the Code.

> "Violence' must, therefore, be understood in its ordinary sense. 'Violence' is a word of wider import than 'force' and includes force used against inanimate objects also. In Morray's New English Dictionary, Vol. X, the meaning given to the word is "To compel or constrain; to force (a person) to or from a place, etc., or to do something, by violence".

4. In -- 'Samaruddin v. Emperor', 40 Cal 367 (C), it was held that :

> "The word 'violence' in Section 146, Penal Code, is not restricted to force used against persons only but extends also to force against inanimate objects."

5. Where, therefore, an unlawful assembly has used force or violence, it becomes guilty of rioting under Section 146 and can be convicted and punished under Section 147, Penal Code. If, however, as a result of the use of that force or violence simple hurt is caused, every member of the unlawful assembly can also be convicted and sentenced under Section 323 read with Section 149, Penal Code. It is not necessary that an unlawful assembly should have caused 'hurt' to enable it to be held guilty of rioting and for a conviction under Section 323 it is not necessary that there should be an unlawful assembly or that unlawful assembly should be guilty of rioting.

6. There can, therefore, be no doubt that where the accused are charged with an offence under Section 147 and an offence under Section 323 read with Section 149, provided the offences are proved, the accused can be convicted under both the sections, 147 and 323/149. There can also be no doubt that they can be sentenced separately under the two sections. The question arises whether the separate sentences are subject to any of the restrictions contained in Section 71, Penal Code, section 71 is as follows :

> "Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such offences, unless it be so expressly provided.
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> Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

ILLUSTRATIONS

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. It A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y."

This section deals with the limit of punishment and the first part deals with a case like the one given in the Illustration. The second part deals with a case where anything done can fall under the

definition of two separate offences, and the third with a case where out of several acts committed some constitute one offence but all taken together a different offence. I have already said that an offence under Section 147 need have no ingredient which is common to Section 323, nor for an offence under Section 323 there need be any ingredient which constitutes an offence under Section 147. There can, therefore, be no doubt that both are separate offences for which separate convictions and separate sentences can be awarded. .

7. It has been urged that an unlawful assembly will be deemed to be guilty of rioting only when it has exercised force or violence and if only one blow has been given then by that one blow both an offence under Section 147 and an offence under Section 323 were completed and, therefore, the limit under Section 71 will apply and the offender cannot be punished with a more severe punishment than the Court which tries him can award for any one of such offences. I find it difficult to accept this argument, for to constitute an unlawful assembly it is not necessary that the blow should have caused any hurt. As soon as force or violence is used the offence of rioting is complete. If the blow has resulted in hurt, then the further offence under Section 323 would also have been committed. I do not, therefore, think that any difference can be made between a case where one blow is given by a member of an unlawful assembly and a case where more than one blow is given by a member thereof. In my view, the restrictions given in Section 71 will not apply to such a case.

8. The case for the prosecution is that several blows were given, but even if it were not so, I would hold that in a case where only one blow was, given by a member of an unlawful assembly, which had caused simple or grievous hurt, every member of the assembly makes himself liable under Section 147 or Section 148, according to the nature of the weapon used, and under Section 323, or Section 325 or any other section, according to the injury caused.

9. In Criminal Revision No. 239 of 1953, the accused were convicted under Section 147 and Section 323 read with Section 149, Penal Code, and were awarded a fine of Rs. 30/- and Rs. 20/- each under each section respectively. In Criminal Revision No. 27 of 1953, some of the accused were convicted and sentenced under Section 148 and Section 326 read with Section 149 and certain others under Section 147 and Section 326 read with Section 149, Penal Code, and were awarded varying sentences. To my mind, the convictions and sentences were perfectly legal.

10. I would, therefore, dismiss both these revisions.

Desai, J.

11. I have had the advantage of reading the judgments of the Hon'ble Chief Justice and Mukerji, J., and concur in the orders proposed in the two revisions.

12. I agree with my learned brothers that the first part of Section 71, Penal Code, deals with a case similar to that given in illustration (a) to the section, that Section 149 does not create any offence (inasmuch as it requires no act to be done for imposition of the penalty prescribed by it but imposes the penalty for an offence committed by another member), that as regards the question to what extent a member of an unlawful assembly can be separately punished for the offences of Sections

147 and 323 read with Section 149 it is immaterial whether he himself caused the hurt or another member of the unlawful assembly and that not only can a member of an unlawful assembly be convicted under both the sections but also he can be separately punished for them. But I respectfully differ from their opinion that the punishment that can be inflicted on a member of an unlawful assembly for the offences of Sections 147 and 323, I.P.C., is in no circumstance subject to the restrictions imposed by the second or third part of Section 71 and that it is irrelevant to consider whether only one blow was given by a member of an unlawful assembly or more than one.

I have given my views on the question in detail in -- 'Behari v. The State', AIR 1953 All 510 (D) referred to by my brother Mukerji in his judgment. I took pains to point out the distinction between a case in which one blow is given and another in which more than one blow is given and stated that in the former case the punishment for the two offences is subject to restrictions imposed by part 3 of Section 71 and the total of the punishments for the two offences cannot be more severe than that for either of them, while in the latter case, the punishment is not subject to any such restrictions and the maximum punishments prescribed in the Penal Code can be inflicted for the two offences. My brother Mukerji thinks that I held that if one blow is given, separate punishments for the two offences cannot be inflicted; I am afraid there has been some misunderstanding because I think I clearly said that separate punishments can be given, though they must be subject to the restrictions imposed by part 2 or 3 of Section 71.

I further agree with my learned brothers that force or violence is something less than hurt and that there may be force or violence which does not amount to hurt. I agree with Mukerji, J. that under parts 2 and 3 of Section 71 the total of the punishments that can be inflicted for the two offences may extend upto the higher of the two maximum punishments prescribed for them and that to this extent -- 'Gopal Das v. State', AIR 1954 All 80 (E), was wrongly decided and should be overruled.

Finally I agree with the Hon'ble Chief Justice that an offence of Section 147 can be committed even if an offence of Section 323 is not committed and vice versa. It does not, however, follow that the punishments for the two offences can never be governed by the third part of Section 71. If an offence of Section 147 is committed without an offence of Section 323 being committed at the same time and subsequently an offence of Section 323 is committed the punishments for the two will certainly not be governed by Section 71; for example where two blows are dealt. But if an offence of Section 147 is committed just because a member commits an offence of Section 323, the position is altered completely. The third part of Section 71 has regard to the actual acts done, and not to mere definitions of the two offences; its applicability depends on the actual acts done (i.e. whether one of them constitutes one offence, and their combination a different offence) & not on the definitions of the two offences (i. e. whether the definition of one includes the whole or part of the other definition).

13. The basis of the view of my learned brothers that even when only one blow is given by a member of an unlawful assembly, all the members can be punished for the two offences (of Sections 147 and 323, I. P. C.) without any regard to the provisions of Section 71, i.e. to the extent of the total of the maximum punishments prescribed for them under the Penal Code, is that an act of giving a blow consists of two parts, one of the preliminary act of aiming a blow and making a movement for

delivering it and the other of actually striking the body of the victim and thereby causing pain. The argument is that as soon as a blow is aimed at the victim and some movement is made for delivering it, force or violence is used and the offence of Section 147 is completed and that when the blow lands on the victim's body so that he feels pain, a further or additional offence of Section 323 is committed, that the two offences are distinct and that maximum punishments can be inflicted for both of them on all the members of the unlawful assembly. I regret I cannot agree that a single act with a definite beginning and a definite end and impelled by a single impulse can be split up into two acts like this. I have no doubt that there is only one act done when one blow is given.

The question that we are considering has given rise to a great, controversy and has been answered in at least five different ways by different authorities. At one extreme there are authorities laying down that there can be no separate convictions even for the two offences; at the other there are authorities laying down that separate and cumulative punishments can be inflicted for the two offences, even exceeding the maximum prescribed for either if more than one blow is given. In AIR 1953 All 510 (D) (supra) I have taken the latter view. Between the two extremes lie the views that separate convictions can be recorded but separate punishments cannot be inflicted, that separate punishments also can be inflicted but cannot be made cumulative and that separate and cumulative punishments can be inflicted but not exceeding the maximum prescribed for either unless the accused has personally committed the offence of Section 323. I do not think any authority has gone as far as my learned brothers except probably Wallace, J., in -- 'Anthony Udaiyan v. Royappudayar', AIR 1928 Mad 18 (1) (P).

If a single act impelled by one impulse is split up into parts there is no limit to which one may go. If any act of dealing a blow can be split up into two parts, one of making a movement to deliver the blow and the other of actually touching the body of the victim, it can also be split up into as many acts of movement as there are moments in the duration of the act, in other words in an infinite number of acts. If an offender is liable to be punished for the two parts (into which the act of dealing one blow is split up) as if they created two distinct offences, on pushing the rule to its logical conclusion he would become liable to be convicted for an infinite number of offences.

Every act which amounts to an offence is necessarily preceded by an attempt; no act can be done without an attempt to do it. To attempt to commit an offence is itself an offence. Generally an attempt is punished under Section 511, Penal Code, but the Code makes special provisions for an attempt to commit certain offences. For example an attempt to cause hurt is punished as an assault under Section 352, I. P. C. When a person deals a blow, he first aims a blow and makes a movement to deliver it; so long as the blow is not actually delivered he has committed an assault or an attempt to cause hurt. As soon as the blow is delivered, the offence of causing hurt is committed. I have not come across a single authority laying down that a person should, or even can, be punished separately without regard to the provisions of Section 71 for committing an offence and also for attempting to commit it. It has never been held so far that when a person is punished under Section 323 he should also be punished under Section 352. I use the word "should" because whether a person can be convicted and punished or not is a matter, of law and not of discretion. If an offence is proved, the accused must be convicted and must be punished; the Court has no option. I cannot agree that separate punishments can be given for these two offences.

An offence cannot possibly be committed unless an attempt is first made and the legislature itself has created a separate offence of an attempt to commit an offence; it follows that the legislature did not contemplate at all that when an offence is committed, the offender should be liable to be punished not only for the offence but also for attempting to commit it. An attempt to commit an offence is punished only when it fails and the offence is not committed. If the offence is committed, the attempt merges in the offence and attempting and committing an offence are treated as just one act for which there can be just one punishment. In fixing the punishment for an offence the legislature must have taken into account the attempt without which the offence could not possibly be committed. Even if an offender is convicted and separately punished for committing an offence and for attempting to commit it, the total of the punishments cannot exceed the punishment for the offence; the third part of Section 71 would bar it. It follows that the third part of Section 71 would bar a more severe punishment for the offences of Sections 147 and 323 than that for Section 147 or Section 323.

Just as one cannot inflict the maximum punishment for the offence of Section 323 and the maximum punishment for the attempt to commit it, so also one cannot inflict the maximum punishment for the offence of Section 323 and the maximum punishment for that of Section 147. When an offender plunges a knife into the chest of another, he ruptures his skin, then breaks ribs and then pierces the heart and puts it out of action; he commits in order of time the offences of Sections 324, 326 and 302, as at the moment of rupturing the skin he commits the offence of Section 324, when he drives the knife deeper into the body and fractures ribs, he commits that of Section 326 and when he drives it still deeper and extinguishes the life he commits that of Section 302.

It cannot be contended that he can be convicted and given the maximum sentences for the three offences.

If his act cannot be divided into those three acts for which separate and maximum punish-ments can be inflicted, I do not understand how an act of delivering a blow can be divided into two parts for which separate and maximum punishments can be inflicted. The dealing of a blow is, and must be treated as, one indivisible act for which only one punishment can be inflicted. By that act the offences of Sections 147 and 323 simultaneously come into existence, and the punishment for them would be governed by part 3, if not part 2 of Section 71. The act of delivering a blow is punishable under Section 323. When it is combined with the other act of being a member of an unlawful assembly, the offence of Section 147 is committed by the combination; the offender cannot be given more severe punishment for them than he can be given for either. When a second blow is delivered, the position is materially altered; the second blow is punishable only under Section 323 because the offence of rioting has already been committed by the infliction of the first blow. In the present cases more than one blow was given; moreover the total of the punishments inflicted on any of the applicants did not exceed the maximum for either of the offences. Therefore, the sentences were legal.

14. I agree that the applications be dismissed.

Mukekji, J.

15. These two cases have been referred to a Full Bench by Division Bench because of the di-vergence of judicial opinion on the question of law that arose for decision in the two cases. The question which has been referred for decision is "whether an accused who has been convicted of any offence punishable under the Penal Code with the aid of Section 149 of the Code can also be convicted and sentenced separately for an offence punishable under Section 147 of the same Code?"

16. The first divergence of opinion on this question was noticeable in this Court when Straight and Brodhurst, JJ. differed with each other. The result of that difference of opinion was a reference to a Full Bench, but the Full Bench did not effectively decide that question. A decision, however, was directly given in the case of -- 'Queen Empress v. Bisheshar', 9 All 645 (G) by Sir John. Edge C. J. and Brodhurst, J. According to their view it was possible to sustain not only two separate convictions, one under some section of the Penal Code read with Section 149 of the same Code and another under Section 147 of the Penal Code bu t also to award separate sentences for the seperate convictions. This view was followed consistently, so far as this Court was concerned, and also in Oudh. After the decision of their Lordships of the Judicial Committee of the Privy Coun-cil in -- 'Barendra Kumar Ghosh v. King-Emperor', AIR 1925 PC 1 (H), however, a doubt appears to have been entertained by certain Judges in regard to the correctness of the view expressed by Sir John Edge, C. J. and Brodhurst, J. This doubt appears to have arisen because of the view expressed by the Privy Council, while discussing the scope of Section 34, I. P C., and while pointing out the difference that they saw in the. scope of Sections 34 and 149, I. P. C. Having been a view expressed by no less an authority than that of the Privy Council the Courts in India treated it with the respect it deserved and some Courts even attempted to utilize it for the purpose of giving a particular meaning to Section 149 of the Penal Code.

17. There has been, therefore, a good deal of difference of judicial opinion on this question between the High Courts in India. The Calcutta High Court has taken a view contrary to that which has prevailed in this Court. The High Courts of Madras and Nagpur also subscribed to the same view as obtained in the Calcutta High Court. There is, therefore, a large volume of case law which can be cited in support of one or the other view. One of the members of this Bench, namely, Desai, J. collected a large number of these decisions and analysed their respective reasonings in a recent decision of his in AIR 1953 All 510 (D). It does not, therefore, appear to me to be necessary to consider all the decisions which were cited before Desai, J. and have been considered by him nor even all those that were cited before us at the Bar during the course of the arguments. Most of these decisions follow a common reasoning. It is, in my view, necessary only to notice some of the decisions in order to appreciate the respective reasonings found in support of the respective points of view.

Before actually considering these decisions I consider it appropriate to focus attention on the relevant provisions of the Code. Section 149, I. P. C., is in these words:

> "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to

> be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence".

18. The object of the section is obvious, namely to fasten constructive liability on all the members of an unlawful assembly for the acts of any one of that assembly. Section 141 of the Code defines an "unlawful assembly" as an assembly of five or more persons who assemble with the common object of doing any of the five unlawful acts catalogued in the section. An unlawful assembly is said to commit riot whenever "force" or "violence" is used by that assembly or by any member thereof, in prosecution of the common object of such assembly, and every member of such assembly is made liable for that use of force or violence under the provisions of Section 146, Penal Code. Section 147, I. P. C. prescribes the punishment for rioting. A member of an unlawful assembly becomes guilty of rioting, when he uses "force" or "violence" or when any other member of the assembly uses such force or violence. The words "use of force or violence" have a different connotation and mean a different thing than causing "hurt", either simple or grievous, to any one, although hurt may be the result of "the use of force or violence", for "force" or "violence" is always a precursor of "hurt".

19. "Hurt" has been defined in Section 319 of the Penal Code as follows :

> "Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt."

By Section 320, Penal Code, "grievous hurt" has been. defined to include eight types of injury to the human body. A man is said to use "force" when "he causes motion, change of motion, or cessation or motion to that other, or if he causes to any substance such motion or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense of feeling"

> -- provided of course he does what has been stated above through some act of his. This would be apparent from the words of Section 349, I. P. C. The word "violence" has the same basic element as has the . word "force". A person is said to be violent when he is impetuous and unrestrained in his action. It is clear that "hurt" can be caused only to the human body, while violence may be used against inanimate objects also. All "hurts" are preceded by force or violence and are the result of force or violence; though therefrom it does not follow that by using force or violence one necessarily causes any hurt.

20. The offence punishable under Section 146, Penal Code, is complete the moment there is use of force or violence by any member of the unlawful assembly whether such force or violence results in any hurt or not. The nature of the hurt determines the penalty, i. e. if it is simple hurt then the penalty incurred is the one provided for by Section 323, Penal Code, if it is grievous hurt then the penalty incurred is the one provided for by Section 325, if it is death then the penalty provided for is, according to the circumstances of the case, either under Section 304 or 302, Penal Code. The vicarious responsibility of the members of an unlawful assembly may extend not only to cases where

only force or violence, apart from hurt, is caused, but also to those cases where the result of force or. violence is hurt and this part of the responsibility is taken account of by Section 149, I.P.C.

There is a basic difference between the liability incurred by a member of an unlawful assembly under Section 143, Penal Code, and the one that is incurred by him under Section 149. Penal Code. The framers of the Code made provision for all contingencies which could arise out of any unruly human conduct. They covered the entire field of punishment for "violence" a human activity by a collection of human beings by enacting Sections 146 and 149. If one is not careful to see the distinction that underlies the two sections then one would be apt to think that the two sections really overlap which, of course, is not the case.

21. Every offence, i.e., a separate offence, has a distinct, punishment prescribed for it. There are, however, certain exceptions whereby a series of successive offences have to be treated as "one offence" for the purposes of punishment; apart from this rule, or exception, a man is answerable & punishable for each offence that he commits. A man who sets upon another with a lathi and beats him with it by delivering successive blows is, strictly speaking, guilty of so many separate offences as the blows that he delivers.

22. If a man causes simple hurt by one blow and grievous hurt by another, then he can be convicted but not punished both under Sections 323 and 325, I.P.C. Section 235, Criminal P. C., makes provision for the trial of a person for more offences than one when such offences are committed during the course of the "same transaction", though at the same time a man may be tried for acts constituting one offence as also constituting another offence when combined together. Sub-section (4) of this section, however, says : "Nothing contained in this section shall affect the Indian Penal Code, Section 71." Section 71, Penal Code, is in these words : (After quoting the section, the Judgment proceeds as under :) This section provides two illustrations. Illustration (a) is worded thus :

> "A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make up the whole beating. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating."

This illustration, to my mind, clearly indicates the scope and the true meaning of the first part of Section 71. The meaning of the important word in that section, namely, the word "parts" has got to be understood in the light of this illustration, otherwise, there is likely to be, as unfortunately there has been, a complete misunderstanding of the meaning which the Legislature intended for that word, or the sense in which that word was used by the Legislature in that section.

23. The second illustration, namely, illustration (b) is in these words :

> "But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable

> to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y."

This illustration further clarifies the position, for it makes it clear that when an offence is committed by an individual as against two separate persons, though, broadly speaking, both the offences may have been committed during the course of one transaction, he is made liable for the as-sualt on both the individuals. It is Important to note that the first part of Section 71, I.P.C., really deals with a case in which the whole of the act is punishable under the same section or under allied sections, namely, where a series of offences partake of the same nature. This part of the section, to my mind, does not deal with a case where a part of man's action constitutes one kind of offence and another part of his action, though committed in a sequence in the course of one transaction, falls under another section, not allied.

The second part of Section 71 of the Code makes provision for a contingency when the same act constitutes more offences than one.

The third part deals with a case where several acts, one or some of which by itself or themselves, constitute one offence and the totality of the acts constitute a different offence.

24. The rule of law contained in this section is, that, in such contingencies as stated above the offender is not to be punished with a more severe punishment than could be awarded to him for any one of such offences. The prohibition is against punishing a man more than once for the same act or the same combination of acts.

25. The first part, of Section 71, broadly speaking, provides or limits punishment for such offences as are triable under Sections 234 and 235, Criminal P. C., while the second part provides for those cases which are triable, under s. 235(2), Criminal P. C. The third part provides for the punishment of such offences as are triable under Section 235(2) of the same Code.

26. In the appeal out of which this reference to the Full Bench has arisen, Nandan and eight others were convicted by a Magistrate of Hamir-pur. Some of the appellants were convicted under Sections 146 and 326 read with Section 149/1. P. C. while the others were convicted under Sections 147 and 326 read with Section 149, I.P.C., and they were awarded separate sentences for their separate convictions. The argument that was made was that the appellants could not be separately sentenced both under Section 147 or 148 and under Section 326 read with Section 149, I.P.C. The argument was that the offence under Section 147, I.P.C. was really made up of two parts and a part of such offence fell under Section 149, I.P.C. The fallacy in the argument lies in the assumption that Section 149 is an offence which is made up of two parts, one of such parts going to make up an offence punishable under Section 147, I.P.C. Section 149 does not create or make any 'particular' offence nor does it provide for any 'particular' punishment for any such offence. It is possible, however, in a sense to say that Section 149 creates an offence; but it creates an offence only in notional sense, inasmuch as it enlarges the scope of all such offences which may be committed by individuals and makes the others liable vicariously with that member of an unlawful assembly who committed the offence actually in prosecution of the common object of that assembly. The view expressed by their

Lordships of the Judicial Committee in the case of AIR 1925 PC 1 (H) in the following words :

> "Section 149, however, is certainly not otiose for in any case it creates a specific offence and deals with the punishment of that offence alone."

can, to my mind, not to be interpreted to mean that Section 149 creates a specific separate offence or prescribes a punishment in the manner in which punishment is provided for say, by Section 323, I.P.C. for an offence of the nature mentioned in Section 321, I.P.C. Section 149 creates an offence only in the sense that it enlarges the scope of an offence and it deals with punishment in the sense that it authorizes the court to punish a man even though he himself had not actually committed that offence.

27. Reliance was placed strongly by counsel for the applicants on the Full Bench decision of the Calcutta High Court in -- 'Nilmony Poddar v. Queen Empress', 16 Cal 442 (FB) (I). This was a Full Bench, composed of five Judges including the Chief Justice of the Court. Four out of the five Judges took the view that separate sentences under Section 148 and under Section 324 read with Section 149 were not justified by virtue of the provisions of Section 71, Penal Code. The argument of the majority of the Judges forming the Full Bench was based on the view that the offence under Section 324/149 was made up of two parts, the first of those two parts being itself an offence which fell within the scope of Section 148, I.P.C. Tottenham, J., however, took the view that the offence of Section 324/149 was not an offence made up of two parts any of which parts was in itself an offence. The offence with which they were concerned in that case, namely, the offence under Section 324, was not an offence which was made up of any parts. By the application of the provisions of Section 149 the liability for that particular offence was enlarged. It was riot as though by the use of Section 149 a new and a separate offence from that punishable under Section 324 was created.

It is, in my view, wrong to think that there is such a thing as a "composite offence" which is made up by the application of Section 149 to the facts and circumstances of any particular transaction. Section 149 does not define or punish any specific offence although it does, in a sense, make an offence or more appropriately enlarge the scope of offences, punishable under the Code. Tottenham, J. expressed the view that he would have agreed with the majority view if he could persuade himself to hold that Section 149 defined and made punishable any specific offence. This view of Tottenham, J. was attacked on the ground that their Lordships of the Judicial Committee of the Privy Council in the case of -- 'Barendra Kumar Ghose (H)', have since expressed a contrary view to what had been expressed by Tottenham, J. The scope of the decision in -- 'Barendra Kumar Ghose (H)', has already been noticed earlier and I only need say here that their Lordships of the Privy Council never intended to and in fact never did lay down that Section 149 created any specific separate offence. To the same effect was the view expressed in -- 'Raghubar v. King Emperor', AIR 1939 Oudh 91 at pp. 93-94 (J) by Yorke, J. when he said that their Lordships of the Judicial Committee did not mean to lay down that Section 149, Penal Code, made a distinct and separate offence from the substantive offence which was committed by a member of the unlawful assembly and for which other members of the assembly were constructively held guilty under the provisions of Section 149, Penal Code.

28. The actual perpetrator while continuing as a member of an unlawful assembly is, without doubt, punishable both for rioting and for the further offence that he commits. No apparent reason appears to me to distinguish his case from that of the other members of the assembly if the law enjoins that the other members would be liable to the same extent as the perpetrator himself and no good reason, therefore, appears to me Why every member of the unlawful assembly should not be punishable in the same manner in which the man who perpetrates the act is punishable. The rule of law is that a man must be convicted of all the offences which he is proved to have committed during the course of any particular transaction. This was stressed by Mahmood, J. in -- 'Queen Empress v. Wazir Jan', 10 All 58 (K), where he said that the use of the word "shall" in the various sections of the Code indicates the imperative mandate of the Legislature that persons guilty of those offences are to be punished, a direction of law which is in keeping with the general principles of jurisprudence.

Mahmood, J. pointed out that there was a section in the Code, namely, Section 71, which governed the entire Code inasmuch as it regulated the limit of punishment in certain cases. He also pointed out that the rule laid down in Section 71 was not a rule of adjective law or procedure, but was a rule of substantive law regulating the measure of punishment and, therefore, it did not affect the question of conviction, which related to the province of procedure. If more than one offence bad been committed then the individual was bound to be convicted for all those offences even though in awarding punishment the provisions of Section 71, Penal Code, had to be kept in view. According to Mahmood, J. the conflict that had arisen out of the various decisions on this matter was due to the fact that a confusion had been created between the rules of law regulating the conviction and the rules which regulated the measure of punishment. Mahmood, J. further pointed out 'at p. 67' that he was not aware of any rule of law that an offence when charged and proved against the accused was to result either in a verdict of not guilty or to remain unpunished, whether such an offence is or is not accompanied by another offence, and whether such latter offence does or does not overlap or include the former.

29. As has been pointed out, Section 71, I.P.C., regulates the province of punishment. It has nothing, to say in regard to the convictions to which a person may be liable for acts which he has committed. Section 71, I.P.C., further does not take away the right of punishment inflictable for the various offences committed. The first part of that; section only limits the amount of punishment awardable by courts under certain circumstances.

30. Wharton in his Criminal Law has pointed out that when a single impulse causes an offence then a single indictment lies no matter how long the action of that single impulse may continue, but if successive impulses are separately given, even though all unite in swelling a common stream of action, then separate indictments would lie. The test, therefore, is whether individual acts fall within the prohibition of Section 71 or the whole course of action constitutes the offence; if the former, then each act is punishable separately, if the latter then there can be but one penalty. As was pointed out by Mr. Justice Sutherland in --- 'Harry Blockburger v. United States', (1931) 76 Law Ed 306 (L), where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences, or only one, is whether each provision requires proof of another fact which the other does not : to wit, whether there was only force or violence or whether there was further "hurt" caused as a result of that force or violence.

31. Before parting with this case it is necessary to point to two decisions, one in AIR 1953 All 315 (B), wherein Kidwai, J. held that separate sentences under Sections 147 and 323 read with Section 149, I.P.C., are illegal. In this case Kidwai, J. relied on the case of -- 'Baldeo Singh v. Emperor', AIR 1940 Nag 120 (M). He did not 'refer to any of the previous decisions of either this Court or of the Oudh Chief Court. For the reasons that I have given above I must, though with respect, say that this case does not lay down good law.

32. Another case which has to be noticed is the decision in AIR 1954 All 80 (E). This case was not cited before us for the obvious reason that the decision was not available in the law reports at the time when the case was argued before us. In this case Dayal and Asthana, JJ. have held that the scope of Section 71, Penal Code, was that when, there was a charge against a person both under Section 409, Penal Code, and under Section 5(1)(c) of Act 2 of 1947, the offender had to be punished within the "lower limit" provided for either of the two offences. With respect, I have to say that this view is not in consonance with the true meaning of Section 71, Penal Code. Section 71 of the Code provides that :

> "where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished....."

then "the offender" cannot be punished "with a more severe punishment" than the Court which tries him could award for any one of such offences. This language, to my mind, does not lend itself to the interpretation which has been given to it in the aforementioned case. The section does not refer to "punishment within the lower limit". It only says that the offender cannot be "punished more severely" than is permissible for any one of the offences with which he is charged. He can be given the higher punishment in respect of the two charges provided the higher punishment could have been inflicted by the Court trying the offender.

33. It has been pointed out already that the use of "force" or "violence" is necessary to constitute the offence of rioting though it may fall short of causing bodily pain. If however, more force is used, or further force is used which does cause bodily pain, then a further offence than rioting also comes into being, and that offence is the offence of causing "hurt". Where five or more persons form an unlawful assembly, then each of them becomes guilty under Section 143, Penal Code. If in furtherance of the common object of the unlawful assembly one of its members uses force or violence, and that use of force and violence falls short of causing "hurt", then all the members of the assembly are punishable under Section 147, I.P.C., but if the force and violence which they use causes "hurt", then another offence also is committed by the members of the unlawful assembly and in respect of that offence they come within the-purview of Section 149, I.P.C., and become liable to punishment in accordance with the nature of the hurt caused. The nature of the weapon used will also make a difference to the nature of the offence committed, if a sharp-edged or a dangerous weapon is used for causing the hurt, then the punishment awardable would be one under Section 148 instead of Section 147, I.P.C., the other offence which comes into being under the "enlarging" or "enabling" Section 149, in respect of all the members of the unlawful assembly, is one out of that group of sections which make particular offences, in accordance with the nature of the "hurt" caused to the human body.

34. My brother Desai, J. expressed the view in AIR 1953 All 510 (D) that if only one blow is dealt by a member of the unlawful assembly, then the Court cannot award separate sentences, because in such a case the restriction imposed by Section 71 would "apply. In my opinion that is not so, because the giving of a blow is not necessary for making the offence punishable under Section 147, I. P. C. In the case before us, on the allegation of the prosecution, an allegation which has been accepted by the Courts below, several blows were delivered so that, strictly speaking, this question did not arise for consideration in this case, but even if it did I would have no hesitation, on the reasoning which has commended itself to me and which I have set down earlier, in holding that every member of the unlawful assembly would be equally guilty and would be punishable under either Section 147 or 148, I. P. C., as also under any of the other sections of the Code providing punishment for injury to the human body. Section 71 would have no application. The giving of the blow, I may point out further, does not, sort of, simultaneously make the giver of the blow punishable under Sections 147 and 323, I. P. C. The result following from the blow makes the offence punishable under either section 323 or the other sections of the Code, while it is the preceding separate act of using force and violence, an act which in law must be clearly viewed as a separate act, makes for the punishment prescribed under Section 147, I. P. C.

35. The two revisions which were before us were Revision No. 27 of 1953 and Revision No. 239 of 1953. In Revision No. 27 of 1953 some of the accused were convicted and sentenced under Section 148 and Section 326, read with Section 149, Penal Code, while the others were convicted and sentenced under Section 147 and Section 326, read with Section 149, Penal Code, and were awarded varying sentences. In Revision No 239 of 1953 the accused were convicted and sentenced under Section 147 and Section 323 read with Section 149. Penal Code, and were awarded sentences of fine of Rs. 30 /- and Rs. 20/-, respectively, under each section. In view of what I have stated earlier, I am of opinion that the convictions and sentences of all the applicants in the two aforementioned revisions were legal. In the result, I would dismiss both the revisions.

BY THE COURT

36. For the reasons given in our judgment we are of opinion that these revisions should stand dismissed. We, therefore, dismiss the revisions.