1913

WAZED ALI KHAN v. EMPEROR.

that a proceeding under section 107 is not a "criminal case." In our view, cases under section 107 are subject to the application of clause (8) of sectin 526, and the Magistrate erred in refusing the adjournment sought.

This Rule, therefore, is made absolute and the order binding the petitioners to keep the peace is set aside. We, however, desire to remark that if in the opinion of the Magistrate there is still apprehension of a breach of the peace between the parties, it is open to him to adopt such preventive measures for the preservation of peace as he thinks proper under the law.

E. H .M. *Rule absolute.*

APPELLATE CRIMINAL.

Before Holmwood and Sharfuddin JJ.

1913

Dec. 17.

RAMAN BEHARI DAS

v.

EMPEROR.*

Charge—Misjoinder—Joinder of three charges under s. 409 with three under s. 477A of the Penal Code—Legality of trial—Criminal Procedure Code (Act V of 1898) ss. 222 (2), 233, 234.

Section 222 (2) of the Criminal Procedure Code refers to cases of criminal breach of trust or dishonest misappropriation of money, and cannot be applied to a case under s. 477A of the Penal Code.

Queen-Empress v. *Mati Lal Lahiri* (1) referred to.

Section 233 of the Code must be strictly followed save where the law itself provides an exception.

A joinder of three charges under s. 409 with three under s. 477A of the Penal Code relating to different transactions is not warranted by any of the

* Criminal Appeal No. 783 of 1913, against the order of S. E. Stinton, Sessions Judge, Sylhet, dated July 28, 1913.

(1) (1899) I. L. R. 26 Calc. 560.

exceptions provided in the Code, and is illegal. Such a misjoinder is absolutely fatal to the trial.

Kasi Viswanathan v. *Emperor* (1) and *Subrahmania Ayyar* v. *King-Emperor* (2) followed.

A series of falsifications of accounts made to cover a single act of defalcation may be laid in one charge under s. 477A of the Penal Code, and does not constitute distinct offences merely by reason of a plurality of false entries intended to cover the same defalcation.

THE appellant was a cashier in the office of the Executive Engineer at Sylhet. The procedure followed regarding cash deposits in the office was as follows. Deposits brought to the accountant were made over to the cashier whose duty it was to enter the amounts on the credit side of the cash-book, and place the same for safe custody in a masonry chest. When the money was sent to the Treasury, the cashier entered the sum despatched on the debit side of the book wrote out a *chalan*, and sent it with the remittance book to the accountant for signature, and then forwarded the money with these two documents to the Treasury by an office peon. The cash and remittance books were written up by the appellant and kept in his custody. The cash-book contained two entries on the debit side, admittedly in the handwriting of the appellant, viz., one, dated 11th October, purporting to show payment of a sum of Rs. 160, made up of a security deposit of Rs. 100 received from a contractor on the 1st October, and of two such deposits of Rs. 30 each, received from contractors on the 8th October, (but entered in the credit side of the cash-book on the 11th) and another entry, dated the 31st October, purporting to show remittances to the Treasury of Rs. 25, and Rs. 12 as. 8, respectively. These three sums were never really sent to the Treasury, and the fraud was ultimately detected.

(1) (1907) I.L.R. 30 Mad. 328. (2) (1901) I.L.R. 25 Mad. 61.

1913

RAMAN BEHARI DAS v. EMPEROR.

The appellants were committed to the Sessions Court on three charges of falsifications under s. 477A of the Penal Code in respect of the three sums. At the trial the Sessions Judge added three corresponding charges under s. 409. The appellant was tried before the Sessions Judge of Sylhet with the aid of Assessors on such charges, and convicted, on the 28th July 1913, and sentenced concurrently, under each section, to two years' rigorous imprisonment.

Mr. Gregory (with him *Babu Ambika Charan Das*), for the appellant. Section 234 of the Code does not justify a joint trial on three counts under s. 409 and three under 477A of the Penal Code: see *Kasi Viswanathan* v. *Emperor* (1). The accused had practically to meet six charges which must have hampered his defence. The appellant was committed under s. 477A only, but the Sessions Court added a new charge under s. 409. Such a procedure was condemned in *Queen-Empress* v. *Mati Lal Lahiri* (2). A misjoinder of the present character is an illegality vitiating the trial: *Subrahmania Ayyar* v. *King-Emperor* (3) followed in *Asgar Ali Biswas* v. *Emperor* (4).

Mr. C. Bagram (with him *Babu Mahendra Nath Banerjee*), for the Crown. There has apparently been a misjoinder, but it is one of form and not of substance. The offences arise out of the same transaction.

HOLMWOOD AND SHARFUDDIN, JJ. This is an appeal from the judgment and sentence of the learned Sessions Judge of Sylhet who in partial agreement with both the Assessors convicted the appellant, Raman Behari Das, of three offences under section 477A and three offences under section 409 of the

(1) (1907) I.L.R. 30 Mad. 328.
(2) (1899) I.L.R. 26 Calc. 560.
(3) (1901) I.L.R. 25 Mad. 61.
(4) (1913) I.L.R. 40 Calc. 846.

Indian Penal Code, and sentenced him to two years' rigorous imprisonment under each section, the sentences to run concurrently.

We are met at the outset by the objection that this trial is wholly void by reason of misjoinder of charges, and that this is so is perfectly clear from the authority of *Kashi Viswanathan* v. *Emperor* (1). The same principle has been affirmed in more than one case recently decided by the Criminal Bench of this Court, and there cannot be the slightest doubt that section 222 does not cover two sets of offences any number of which may be tried together. The second clause of the section refers to cases of criminal breach of trust or dishonest misappropriation of money, and it is held that it is not necessary to specify the separate sums which have been embezzeld, provided that the time included between the first and the last date, on which the sums were misappropriated, shall not exceed one year. This sub-section cannot be applied to section 477 A of the Indian Penal Code, as was pointed out in the case of *Queen-Empress* v. *Mati Lal Lahiri*(2). Section 233 must be strictly followed, save and except where the law itself provides an exception, and this joinder of three charges under section 409 and three charges under section 477A is not covered, as was pointed out in the Madras ruling, by any of the exceptions provided in the subsequent sections of the Code. It is true that it was not necessary for the learned Judge to have drawn up three charges under section 409, inasmuch as, by reason of section 222, one charge would have been sufficient. In the same way it is perhaps doubtful whether it is necessary to draw up three charges under section 477A. A series of alterations in accounts made to cover a defalcation

(1) (1907) I. L. R., 30 Mad., 328. (2) (1899) I. L. R., 26 Calc. 560.

1913

RAMAN BEHARI DAS v. EMPEROR.

might all be charged in one charge under the provisions of section 477 A, and there are not three distinct offences committed by an accused person merely by reason of the fact that he makes more than one false entry to cover one defalcation. But the false entries in that case can only relate to one defalcation. It is impossible to take a series of false entries referring to three different defalcations in the same trial although it might be possible to try three defalcations in one charge, or to try a whole series of falsified accounts in one charge. The two could not be combined in the manner in which they have been combined in this case. Such misjoinder is, since the well-known ruling of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1), absolutely fatal to the trial which must accordingly be held to be void.

We have heard the learned counsel at some length upon the merits, and we do not wish to say anything which could prejudge the case, inasmuch as, after giving the matter our most patient attention, we are convinced that this is a case where the ends of justice require that there should be a retrial, and that that retrial should be held upon the charges under section 477A upon which the accused was originally committed to the Court of Session. The charge should be framed as nearly as possible in the words of the section itself. We may refer to the ruling in *Emperor* v. *Rash Behari Das*(2) as showing what we mean. It was there held that where an accused in making entries which are charged against him was in reality furthering a fraud that had already been committed, that fell within the purview of section 477A. But it would appear upon that ruling to be safer to set out the separate items of falsification in

(1) (1901) I. L. R. 25 Mad. 61. (2) (1908) I. L. R. 35 Calc. 450.

separate charges. We, therefore, on the whole, think that the case should be re-tried upon the three charges under section 477A as originally committed to the Sessions.

The conviction and sentence passed upon the appellant are set aside, and he will remain on the same bail pending his re-trial before the Court of Session as ordered above.

E. H. M. *Re-trial directed.*

APPELLATE CIVIL.

Before Coxe and D. Chatterjee JJ.

DEBI PROSAD SAHI

v.

DHARAMJIT NARAYAN SINGH*.

Mortgage—Hindu law—Mortgagee holding an usufructuary and a simple mortgage over the same property—Suit by the mortgagee as kurta of Joint Hindu family on later mortgage alone—Maintainability—Non-joinder of necessary party—Transfer of Property Act (IV of 1882) ss. 85, 99—Civil Procedure Code (Act V. of 1908) O. XXXIV, rr. 1, 14.

Where the *Kurta* of a joint Hindu family, who was the holder of an usufructuary and a simple mortgage, brought a suit on the latter without joining as party one of the members of the family, who had a joint interest with him in the usufructuary mortgage :—

Held, that under the terms of s. 85 of the Transfer of Property Act and O. XXXIV, r. 1 of the Civil Procedure Code, the plaintiff was bound to make him a party.

Hori Lal v. *Munman Kunwar* (1) and *Madan Lal* v. *Kishan Singh* (2) not followed.

Lala Surja Prosad v. *Golab Chand* (3) followed.

* Appeal from Original decree, No. 149 of 1909, against the decree of S. K. Nag, Subordinate Judge of Saran, dated Nov. 30, 1908.

(1) (1912) I. L. R. 34 All. 549.
(2) (1912) I. L. R. 34 All. 572.
(3) (1900) I. L. R. 27 Calc. 724, & (1901) I. L. R. 28 Calc. 517.