APPELLATE CRIMINAL.

Before Shams-ul-Huda and Duval JJ.

1919.

Aug. 6.

KASEM ALI

v.

EMPEROR.*

Charge—Misjoinder—Acts of theft and association during a period exceeding a year—Order to give security whether a bar to trial under the Penal Code, s. 401—Withdrawal of case against an accused—Competency of such person as witness—Criminal Procedure Code (Act V of 1898), ss. 234 and 494—Admissibility of evidence of previous conviction and of security orders on trial under s. 401 of the Penal Code—Belonging to a gang associated for the purpose of habitually committing theft—Sufficiency of evidence in proof of such offence—Penal Code (Act XLV of 1860), s. 401—Making tabular statement, prepared by Public Prosecutor, part of judgment.

Section 234 of the Criminal Procedure Code does not apply to a single charge under s. 401 of the Penal Code of belonging to a gang of persons associated for the purpose of habitually committing theft between January 1911 and September 1917. The charge relates to one offence only, though based on evidence of several offences of theft and various acts of association during such period. The gist of the offence under s. 401 is association for the purpose of habitually committing theft or robbery, and habit is to be proved by the aggregate of acts.

Re Shriram Vankatasami(1) referred to.

An order under s. 110 of the Criminal Procedure Code against the accused, and detention in jail for failure to furnish security thereunder, do not bar their subsequent trial and conviction under s. 401 of the Penal Code.

Evidence of previous conviction of theft and of being bound down under s. 110 of the Criminal Procedure Code is not admissible on a subsequent trial of the accused, under s. 401 of the Penal Code, to prove either the commission of such offence or bad character.

* Criminal Appeals Nos. 101 and 95 of 1919, against the order of R. K. Roy, Special Magistrate of Sylhet, dated Dec. 28, 1918.

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Mankura Pasi v. *Queen-Empress* (1), *Kader Sundar* v. *Emperor* (2) followed.

Quære: whether a previous conviction may be used for the purpose of proving only association.

An accused person is, after a withdrawal under s. 494 of the Criminal Procedure Code and discharge, a competent witness.

Evidence of the commission of several thefts, of meeting together at different places, before and after the commission of thefts and burglaries in bazars, boats and houses, of being seen on various occasions carrying away stolen articles or found in company under circumstances suggesting complicity in thefts and burglaries, and evidence of systematic thefts of cattle by individual accused are *held* sufficient to support a conviction under s. 401 of the Penal Code.

It is generally undesirable to make documents prepared by the parties to a case part of the judgment, but where a statement of the prosecution evidence was checked by the Trial Court before being embodied in the judgment, the accused was *held* not to have been prejudiced.

In September 1917, proceedings under s. 110 of the Criminal Procedure Code were instituted against one Mason Haji and 12 others, including the appellants Munshi and Jaban Ali, before Babu Probhat Chandra Chatterjee, Extra Assistant Commissioner of Karimganj, in the district of Sylhet. Ten were bound down for three years and the others for one year, but all were sent to jail for failure to provide sureties. Mason made a confession to the Trial Magistrate disclosing the operations of a gang of persons associated together to commit theft and burglary. The Local Government thereupon appointed Maulvi Mufizur Rahman, Extra Assistant Commissioner, to verify the confession. Mason made a more detailed confession before him specifying the cases of thefts and burglaries in which he and the other members of the gang were concerned. Mufizur Rahman then proceeded to verify the confession. Thereafter, upon the examination of the police and judical records of the cases mentioned in the confession, one

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Surendra Nath Sen, an inspector of the C. I. D., drew up a first information report under s., 401, of the Penal Code, on the 20th March 1918. A police investigation followed, and a charge sheet was submitted on the 12 June, and 33 accused persons, including Mason Haji, were sent up to the Court of the Subdivisional Officer of Karimganj. On the 14th June the charge against Mason was withdrawn by the Public Prosecutor, and he was discharged under s. 494 of the Criminal Procedure Code. On the 9th July Babu Rajani Kanta Rai was appointed a Special Magistrate, under s. 30 of the Code, to try the case, and the District Magistrate made it over to him. Before the commencement of the trial four more accused were arrested and the case proceeded. Two prisoners were discharged under s. 253 of the Code. A single charge, under s. 401 of the Penal Code, was then drawn up against the remaining accused of belonging to a gang of persons associated for the purpose of committing theft between January 1911 and September 1917.

The history of the formation of the gang and its activities was deposed to by Mason. It appeared that in 1904 Kasem Ali, Mason and other pilots in the service of the India General Steam Navigation Company, were dismissed from service in connection with an assault upon Mr. Barkley, the Pilot Superintendent of the Company. Kasem and Mason formed a gang in 1908 with the object of committing theft on steamers and in bazars and other places. Their numbers gradually increased and the gang was regularly organized in 1911. Specific evidence was given at the trial as to when and how the several accused joined it. It ultimately comprised 50 or 55 members including the accused under trial. Mason mentioned 74 cases of theft in 11 of which Kasem was concerned, while Munshi and Jaban were implicated

in 11 and 31 of the cases respectively. Evidence was also given of thefts in bazars and boats and of cattle thefts, all of which, excepting three or four, were committed by different members of the gang between January 1911 and September 1917. The Magistrate convicted the accused under s. 401, Indian Penal Code, on 23rd December 1918, and sentenced Kasem, Munshi and Jaban to five years' rigorous imprisonment, and the others to terms ranging from two to four years' rigorous imprisonment.

All the accused appealed to the High Court, but the Criminal Bench admitted the appeals only of Kasem, Munshi and Jaban, and sent the appeals of those sentenced to four years and under to the Sessions Judge of Sylhet for disposal. On the 3rd May 1919, the Judge dismissed their appeals.

Mr. K. Ahmed (with him *Babu Bir Bhusan Dutt*), for the appellants in Criminal Appeal No. 101. The Magistrate did not give judicial consideration to the case in discharging the accused. The discharge was illegal, and the accused could not be examined as a witness. The charge, being based on acts of theft and association during a period exceeding one year, is bad under s. 234. Two of the appellants were bound down under s. 110, Criminal Procedure Code, and cannot be punished again under s. 401 of the Penal Code. The confession of Mason and the evidence of verification were inadmissible. Mason is an unreliable approver whose evidence requires material corroboration. Evidence of previous conviction and of orders under s. 110 was inadmissible: *Mankura Pasi* v. *Queen-Empress*(1), *Kader Sundar* v. *Emperor* (2). The evidence is not sufficient to support the charge. The Magistrate was wrong in placing on the record and

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adopting in his judgment a tabular statement of the prosecution evidence made by the Public Prosecutor.

The Deputy Legal Remembrancer (*Mr. Orr*) and *Babu Manindra Nath Banerjee*, for the Crown, were not called upon to reply.

Cur. adv. vult.

SHAMS-UL-HUDA J. Thirty-four persons were placed on their trial on a charge under section 401 of the Indian Penal Code. The trial was held by a Magistrate specially authorized under section 30 of the Code of Criminal Procedure. The trial lasted a long time, in the course of which 314 witnesses were examined. The Magistrate acquitted two of the accused and convicted the rest. Three of them were sentenced to more than four years' rigorous imprisonment, and they have appealed to this Court under section 408 (*b*) of the Code.

The facts of the case are briefly as follows:— Proceedings under section 110 of the Criminal Procedure Code were taken in the year 1917 against Mason Haji and others including two of the appellants, Munshi and Jaban. Mason Haji made a confession which led to an enquiry, and the Local Government appointed M. Mufizur Rahman to verify the confession made by Mason. M. Mufizur Rahman then recorded the confession of Mason at a greater length than it was taken down before, and went on to verify the statements made to him. The accused were then sent up for trial. On the 14th June 1918 the charge against Mason was withdrawn by the Public Prosecutor under section 494 of the Criminal Procedure Code and he was discharged. Mason's confession formed the basis of the present charge. The learned Magistrate has, in an exhaustive judgment, dealt with the whole evidence in the case,

and he has considered separately the case of each individual accused. The evidence against each accused has been separately detailed in the judgment, and it is unnecessary to repeat it.

Several points have been argued by the learned counsel who appeared on behalf of the appellants. The first argument is that the Magistrate in discharging Mason did not give judicial consideration to the case, and, therefore, the order of discharge is illegal and has no legal effect. As to this argument I need only say that, upon the reported decisions, it is enough that the accused person had been discharged before he gave his evidence and was not on his trial when such evidence was given. This, in my opinion, is quite sufficient to make his evidence admissible.

The next point argued was that the charge was bad having regard to the provisions of s. 234 of the Criminal Procedure Code. It seems to me that there is no substance in this contention. S. 234 lays down that, when a person is accused of more offences than one of the same kind committed within the space of 12 months, he may be charged with and tried at one trial for any number of them not exceeding three. In this case the accused were not charged for more offences than one. They are charged with one offence only. An offence under s. 401 is a special one. The gist of the offence is association for the purpose of habitually committing theft or robbery and, as pointed out by the Madras High Court in *Re Shriram Venkataṣami* (1), habit is to be proved by the aggregate of acts, and though the charge is a charge of a single offence, the period over which the association extends is often very long; and the longer the period the better it is to establish habit. The question of confining the charges to three

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in the course of a year, therefore, does not arise in the case, and section 234 has no application.

The next point urged is that the accused having been bound down under section 110 of the Criminal Procedure Code, they cannot again be punished for being members of a gang associated for the purpose of habitually committing crimes under section 401 of the Indian Penal Code. This, it is urged, is punishing a man twice over for the same offence. It is clear that a conviction under section 110 of the Criminal Procedure Code has nothing to do with the punishment of an offence. The order under section 110 of the Criminal Procedure Code is merely preventive, and only bound down the accused to be of good behaviour. It was not punishment for any offence committed by them.

It is also urged that the confession of Mason recorded by Maulvi Mufizur Rahman, and consequently the evidence of verification by that officer, are not admissible. This may be so, but after making the confession the approver has repeated his story in Court in his evidence on oath, and, therefore, the question of the admissibility of the confession is of no practical importance, and though I am of opinion that the confession was of no value as a piece of evidence, that does not affect the merits of the case.

It has next been urged that the evidence of previous conviction for an offence under the Indian Penal Code, or evidence to show that the accused had been previously bound down under section 118 of the Criminal Procedure Code, was inadmissible. Reliance has been placed on decisions of this Court in *Mankura Pasi* v. *Queen-Empress* (1) and *Kader Sundar* v. *Emperor* (2). I think this contention is sound, and the evidence of previous conviction was

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wrongly admitted, although there may be some doubt whether, if it can be shown that in a previous case a number of the accused persons were placed on their trial together and convicted, such conviction can be used not for the purpose of proving the conviction or proving bad character but for proving association.

In my opinion, leaving aside the evidence which I have held to be inadmissible, the rest of the evidence is ample to establish the guilt of the appellants. The evidence which has been detailed by the learned Magistrate in his judgment shows that the accused often met together at different places before or after the commission of offences, and have been seen on various occasions carrying away stolen articles or seen together under circumstances that suggested their complicity in thefts and robberies and their association for the purpose of habitually committing such offences. This evidence is very strong: especially against the three appellants. Mason Haji speaks of 74 thefts or burglaries, out of which the accused Kasem Ali is said to have taken part in 11. Jaban in 31 and Munshi in 11. No reason has been shown why the numerous witnesses, who have deposed on behalf of the prosecution and who have been believed by the learned Magistrate, should be disbelieved by us. I may also state that in the appeal that was preferred by the other accused persons, who were sentenced to less than four years' rigorous inprisonment, the learned Sessions Judge has upheld the conviction and believed the evidence upon which the conviction of the present appellants is largely based.

It has been complained before us that the Magistrate was wrong in placing on the record certain statements prepared by the Public Prosecutor and in making them a part of his judgment. No doubt it is

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generally not desirable to make documents prepared by parties to a case, part of the judgment, but in this case, as I have said, the record was voluminous and the statements do not furnish any new materials, but are simply the result of the examination of the evidence by the Public Prosecutor. If the learned Magistrate had taken those statements on trust there might have been some ground for complaint. But in this case the Magistrate has recorded, and he has done so on every page of these statements, that he has checked them himself. Under these circumstances, I do not think that the accused have been in any way prejudiced by the action of the Magistrate. The convictions and sentences are, therefore, upheld and the appeals are dismissed.

DUVAL J. I agree with the judgment of my learned brother. As to the tabular statements, I would like further to point out that, though the learned counsel objected to them as being wrongly incorporated in the judgment, it is clear that they were checked by the Magistrate, and the learned counsel has not been able to show to us that in any single particular these statements, which are really an epitome of the evidence put in a tabular form, are incorrect. The learned counsel, though he did not enter into details about individual witnesses, made some comments on the oral evidence in general. As to the approver, his position was that, as he had been discharged under section 494 of the Criminal Procedure Code, his evidence should be expunged from the record. My learned brother has dealt with that matter, and I agree in holding that after his discharge he was a person competent to be a witness. Then as to his evidence in Court and his confessions recorded by Mr. P. C. Chatterjee and M. Mufizur Rahman, no doubt the earlier confessions could

have been used by the defence for the purpose of contradicting what the approver Mason said in the course of the trial, and indeed it appears that there are certain discrepancies between his evidence during the course of the trial and his confession before Mr. Chatterjee. It is urged that as approver he is an unreliable witness, and of course no one can be convicted on the uncorroborated evidence of an approver. But here we have, before us, a large mass of corroborative evidence. There is first the evidence of association. This evidence shows that these accused and others were frequently seen together, specially at *hâts*, and there is evidence that shortly after they were seen together thefts and robberies used to take place; and as to the three men whose cases are before us, we have a mass of direct evidence against Kasem of robberies in houses, bazars and boats, against Jaban of robberies in houses and boats and against Munshi of robberies and thefts in shops and boats as well as thefts of cattle. We also have the evidence about Kasem and Jaban being engaged in the same thefts. The evidence shows that several of the accused were originally pilots on river steamers: and after their dismissal from the Steamer Company's service, thefts on river steamers and boats plying on the river and at the river-side bazars became frequent, and in addition to these thefts in boats and bazars the gang also engaged in thefts and robberies in houses and in regular systematic theft of cattle. On the evidence adduced I hold that the existence of a gang for committing thefts and burglaries has been amply proved: further, that the three men before us were members and (I should add) leaders of that gang.

E. H. M. *Appeals dismissed.*