

APPELLATE CRIMINAL.*Before Newbould and Ghose JJ.*

CHETTO KALWAR

v.

EMPEROR.*

1921

Sep. 8.

Charges—Misjoinder—Cumulative charges under ss. 411 and 414, of the Penal Code—Error not cured by striking out at the close of the trial the charges illegally joined together, and proceeding on the legal charges—Proper procedure in such cases—Criminal Procedure Code (Act V of 1898) s. 234.

Cumulative charges under sections 411 and 414 of the Penal Code against an accused person are bad for misjoinder under s. 234 of the Criminal Procedure Code and vitiate the trial altogether.

The error cannot be corrected at the conclusion of the trial by the Magistrate stating in his judgment that, if the charges had been framed in the alternative, they would have been valid under s. 236, nor by his proceeding only on the charges that were legally triable and dropping the rest. If he wished to strike out any of the charges he should have done so before concluding the trial, and should have given the accused an opportunity of making such defence as he thought fit on the charges as amended. Re-trial ordered by another Magistrate.

ON the 26th January 1921 the shop of Macfie and Macdonald, tailors in Old Court House Street, Calcutta, the proprietors of which were one Gholam Mahomed and his brother, was broken into and a large quantity of valuable cloths stolen. It was alleged that the accused, Chetto Kalwar, had, in March of the same year, sold at his godown in No. 7, Church Lane, several of the stolen cloths to one Shama Sao living in Kidderpore. The latter disposed of two of them (Exs. i and ii) and two more to Shew Pershad, and two to

* Criminal Appeal No. 376 of 1921, against the order of A. Z. Khan, Third Presidency Magistrate of Calcutta, dated June 16, 1921.

1921
 CHETTO
 KALWAR
 v.
 EMPEROR.

Lachmi Narain. On 29th March Shew Pershad offered Exs. i and ii for sale to a native dealer who bought them and communicated with Gholam Mahomed, with the result that Shew Pershad was arrested on the 31st. The police, on receiving his explanation, accompanied him to the house of Shama Sao who admitted the sales made by him to Shew Pershad and Lachman, and stated that he had purchased the cloths from Chetto, the first accused. The police recovered the cloths from Shew Pershad and Lachman (Exs. iii, iv and xl). Shama Sao then took the police officers to the godown in 7, Church Lane. The second accused, Jug Mohan Kalwar, was seated outside and was arrested on certain information given by Shama. The godown was then searched and various pieces of cloth found, some of which were identified as stolen property by Gholam Mahomed. Three pieces were also found in two other godowns rented by Chetto and identified by the former.

The accused were put on trial before A. Z. Khan, Fourth Presidency Magistrate, and charged as follows:—The 1st, 3rd and 5th counts charged Chetto Kalwar under s. 411, I. P. C., with dishonest retention of Exs. i and ii on the 25th March 1921, Exs. iii, iv and xl on the 27th March, and the rest of the articles on the 31st March. He was further charged, under s. 414, I. P. C., in the 7th, 9th and 11th counts, with voluntarily assisting in disposing of the same articles on the respective dates specified in the previous counts against him. Jug Mohan was charged under ss. 411 and 109, I. P. C., in counts 2, 4 and 6, with abetment of the offences mentioned in the 1st, 3rd and 5th counts stated above, and also under ss. 414 and 109, I. P. C., in counts 8, 10 and 12, in respect of the offences under s. 414 charged against Chetto in the three counts thereunder.

During the argument an objection was taken by the accused to the joinder of the three offences under s. 411, I. P. C., with the three under s. 414, I. P. C., as contravening the provisions of s. 235 of the Criminal Procedure Code. The Magistrate held, in his judgment, that the two sets of charges against Chetto under ss. 411, and 414, I. P. C., respectively, could be treated as valid charges in the alternative under s. 236, the omission to expressly frame them as such being a defect cured by s. 225 of the Criminal Procedure Code, but that it was safer to drop the three charges under s. 414, I. P. C., and proceed only on the three under s. 411, I. P. C.

Objection was taken at the same time to the joint trial of the two accused as not warranted by s. 239 of the Criminal Procedure Code. The Magistrate disposed of the contention in his judgment as follows:—

I think the facts and circumstances are such that the two accused should not be tried together. At least Jug Mohan can only be charged with having abetted Chetto in the commission of some offences under the first two charges under s. 414, I. P. C. His connection with the third charge (under s. 414) is not at all established. But Chetto is now being dealt with under s. 411 and not s. 414, I. P. C., so that Jug Mohan must go out of the case.

The Magistrate convicted Chetto under s. 411, I. P. C., in respect of the properties covered by the 1st and 3rd counts and under s. 54 of the Calcutta Police Act (Beng. IV of 1866) as to the articles referred to in the 5th count. He acquitted Jug Mohan Kalwar. Chetto appealed to the High Court.

Babu Manmatha Nath Mukerjee (with him *Babu Heramba Chandra Gupta* and *Babu Mahendra Lal Roy Chowdhry*), for the appellant. The trial is bad for misjoinder of charges under ss. 411, and 414, I. P. C., and the defect cannot be cured at a late stage by

1921

CHETTO
KALWAR
v.
EMPEROR.

1921
CHETTO
KALWAR
v.
EMPEROR.

reducing the charges to those legally within the scope of s. 234.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown. The two sets of charges under ss. 411 and 414, I. P. C., relate to the disposal of the same goods from one place. The error, if any, was cured by s. 225 of the Criminal Procedure Code. The appellant was not prejudiced in any way.

NEWBOULD AND GHOSE JJ. It is unnecessary to discuss the facts of this case in this appeal as we are of opinion that the trial was bad for misjoinder of charges, and we propose to order a retrial of the appellant. At the trial the present appellant Chetto Kalwar and one Jug Mohan Kalwar were jointly tried. Twelve charges were framed against them. In the first, Chetto was charged with wrongful possession of two items of stolen property on the 25th of March 1921. In the second Jug Mohan was charged with having abetted that offence. In the third charge, Chetto was charged with being in wrongful possession of three items of stolen property on the 27th of March 1921 and, in the fourth charge, Jug Mohan was charged with having abetted that offence. In the fifth charge, Chetto was charged with being in wrongful possession of eleven items of stolen property on the 31st of March 1921 and, in the sixth charge, Jug Mohan was charged with the abetment of that offence. Then in the remaining charges Chetto and Jug Mohan were each separately charged with having assisted in the disposal of the stolen properties referred to in the six previous charges. When writing his judgment the Magistrate held that there should not have been a joint trial of the two accused and acquitted Jug Mohan. He also held that it was safer to proceed against the first accused Chetto under the three heads

of section 411, I. P. C., only, and to forego those under section 414, I. P. C. In the end he convicted the appellant on the first and third charges and, with reference to the facts stated in the fifth charge, he held that an offence punishable under section 54A of the Calcutta Police Act had been committed.

We think that the joinder of the charges of offences under section 411, I. P. C., with charges of offences under section 414, I. P. C., was bad. Had the charges been framed in the alternative, this might have been within the terms of section 236, C. P. C. But as the charges were framed, they were not in the alternative, and the mistake cannot be corrected by the argument that, if they had been in the alternative, there would have been no defect in the trial. Having framed defective charges, the Magistrate could not remedy the error, at the conclusion of the trial, by saying in his judgment that he would only proceed on the charges that had been legally joined. If he wished to strike out any of the charges he should have done so before concluding the trial, and should have given the accused an opportunity of making such defence as he thought fit on the charges as amended. Not having done so, we must hold that the error vitiated the trial and made the conviction illegal. We, accordingly, allow this appeal, reverse the conviction and sentence of the appellant, and direct that he be retried according to law. We are asked to order that the retrial be taken place before another Magistrate, and no objection is taken to this on behalf of the Crown. We, accordingly, direct that the retrial do take place before such other Magistrate as the Chief Presidency Magistrate may select.

E. H. M.

Retrial ordered.

1921
CHETTO
KALWAR
v.
EMPEROR.