1923

SASI KANTA ACHARJYA v. SALIM SHEIKH.

GHOSE J.

an omission of the Legislature in not making such a provision. With great respect, therefore, I am unable to accept the opinion expressed in some of the cases that an application made and withdrawn has the effect as if the application had never been made. There does not appear to be any binding decision to the contrary on the question involved in these cases. On the other hand, the facts in *Abeda Khatun* v. *Majubali Chowdhury* (1) closely resemble the facts in the cases before us. The appeals must, therefore, be dismissed and with costs in those cases in which the respondents have entered appearance.

WALMSLEY J. I agree.

B. M. S. *Appeals dismissed.*

(1) (1920) I. L. R. 48 Calc. 157; 24 C. W. N. 1020.

CRIMINAL REVISION.

Before Greaves J.

NAGENDRA NATH BOSE

v.

EMPEROR.*

1923

March 6.

Autrefois Acquit—Acquittal on trial for criminal breach of trust of a sum between certain dates—Subsequent trial for criminal breach of trust of a separate sum during the same period—Misappropriation of latter not known to the prosecutor on the former trial—Second prosecution not barred—Criminal Procedure Code (Act V of 1898) s. 403.

An acquittal on a charge, under s. 409 of the Penal Code, of criminal breach of trust of a certain sum of money committed between two specified dates, does not bar, under s. 403 of the Criminal Procedure Code, a subsequent trial for criminal breach of trust, committed on an intermediate date, of a separate sum which was not included in the amount, forming

* Reference to a third Judge from the dissentient judgments of Newbould and Suhrawardy JJ. in Criminal Revision No. 1098 of 1922.

1923

NAGENDRA NATH BOSE v. EMPEROR.

the subject of the first trial, by reason of the facts relating to the misappropriation of the latter sum not having been known to the prosecutor at the time of the previous charge.

Emperor v. *Kashinath Bagaji Sali* (1) followed.

In re Appadurai Ayyar (2) not followed.

THE petitioner, who was a cashier in the office of the Assistant Director of Military Works, Presidency and Assam districts, Fort William, was tried at the fourth Criminal Sessions of the High Court before Cuming J. and a Jury. He was charged, on the complaint of Major Holt White, under s. 409 of the Penal Code, with criminal breach of trust of a sum of Rs, 18,924 odd, committed between the 1st October 1921 and the 1st March 1922. After some evidence had been recorded the Standing Counsel withdrew the charge, on the 28th August 1922, whereupon the following order was recorded:—"*Withdrawn with leave of the Court, as no evidence was offered.*" The petitioner was then acquitted. Shortly after, on the complaint of the same prosecutor, the police sent up the petitioner on a charge, under s. 408 of the Penal Code, of criminal breach of trust as a servant of a sum of Rs. 100 committed on the 30th November 1921. It was alleged that the discovery of the criminal misappropriation of this sum was made by the prosecutor after the termination of the first trial. The third Presidency Magistrate took up the case on the 8th December 1922. when the petitioner filed an objection pleading *autrefois acquit* in bar of the second trial. The Magistrate overruled the objection, whereupon the petitioner obtained the present Rule from the High Court.

The case was heard by Newbould and Suhrawardy JJ. who differed in opinion. Their Lordships' judgments were as follows:—

NEWBOULD J. In my opinion this rule should be discharged. The petitioner was tried and acquitted on a charge of having committed criminal

(1) (1910) 12 Bom L. R. 226. (2) (1915) 17 Cr. L. J. 30.

1923

NAGENDRA NATH BOSE *v.* EMPEROR.

breach of trust, in respect of Rs. 18,924-4 annas, during the period between 1st October 1921 and 1st March 1922. He is now being prosecuted on a charge of having committed criminal breach of trust, in respect of a sum of Rs. 100, on the 30th November 1921. It is contended on behalf of the petitioner that, under section 403 of the Code of Criminal Procedure, the accused having been tried on the charge of the defalcation committed within the periods stated, he is not liable for prosecution for any further defalcation committed during that period. There would be considerable force in this contention if it were shown that the defalcation, which is the subject of the present charge, could or might have been included in the former charge. But it is the case for the Crown, and on the materials before us I cannot say that that case will not be substantiated at the trial, that the defalcation of this item charged could not have been in the knowledge of the prosecution at the time of the previous trial. That being so, if it was impossible for the accused to have been tried at the previous trial, I am unable to see how the acquittal can, under the provisions of section 403 of the Criminal Procedure Code, be a bar to his being now tried. I would, therefore, discharge this Rule.

SUHRAWARDY J. I regret I am unable to agree with my learned brother in the view of the law which he has taken in this case. In my opinion the second prosecution on the facts disclosed would not lie. The accused was charged in the previous trial of "committing defalcation, "being a public servant, within the period from 1st October 1921 to 1st "March 1922, in respect of an amount which was alleged in the charge to "be rupees eighteen thousand nine hundred and twenty-four and annas four "only, by dishonestly misappropriating or converting to his own use, having "been entrusted in such capacity with certain property or dominion over "such property." The present case is an attempt to prosecute him for committing embezzlement, in respect of the sum of rupees one hundred received by him on the 30th November 1921, that is, on a date within the period in respect of which he was tried at the previous trial. It is, therefore, contended that the acquittal in the previous trial following on the withdrawal of the charge by the Standing Counsel under section 494 of the Criminal Procedure Code operates as a bar to the present prosecution.

Section 222(2) of the Criminal Procedure Code lays down that "When "an accused is charged with criminal breach of trust or dishonest mis-"appropriation of money it shall be sufficient to specify the gross sum in "respect of which the offence is alleged to have been committed, and the "dates between which the offence is alleged to have been committed, without "specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of *one offence*." It means that it is permissible to prosecute a person for defalcation within certain given dates irrespective

of the number of items which he is said to have misappropriated. This clause to my mind modifies or affords an exception to the general rule enunciated in section 234 of the Criminal Procedure Code, which says that a person cannot be tried for more than three offences committed within the period of one year. It enables the prosecutor to charge the accused with misappropriation in respect of any number of items in spite of section 234 of the Criminal Procedure Code, but does not entitle him to maintain prosecution by instalments for misappropriation, committed within the same period, of items which may have formed the subject of the previous charge. The main element of the offence tried under section 222 (*2*) is the period, within which the accused is said to have committed the offence of criminal breach of trust and not so much the amount in respect of which he might have committed it. For example, if the accused commits criminal breach of trust, within certain dates, in respect of twenty items, it is open to the prosecution to charge him with all the twenty or for any less number. The offence would be considered to be one committed during those dates. If any other interpretation were accepted, namely, that the prosecution is at liberty to leave out certain items for further prosecution, the object of the law barring further prosecutions on the same facts would be defeated, and would result in the splitting up of the "*one offence*," as created by section 222 (*2*). I do not think that the fact whether the item for the embezzlement of which the accused is subsequently charged was known or not known to the complainant, or could or could not have been known to him, affects the law on this point and is relevant to the present enquiry. The question that really matters is whether the accused *might have been* charged in the preceding trial with the offence for which he is subsequently put on his trial. As a matter of fact, from the perusal of the record, I find that Major T N. Holt White was the complainant in the previous case, and in the charge sheet it is stated that the accused committed criminal breach of trust in respect of rupees eighteen thousand and odd within the 1st October 1921 and 1st March 1922. In the detail of the items of the amount the fifth item is given as "other items." In the present case the same gentleman, Major Holt White, states in the charge sheet submitted by the police that "the "accused committed criminal breach of trust as cashier in the office of the "Military Works Department in respect of rupees one hundred, deposited "as earnest money in the said office by one Ramdhari, a contractor, on a "tender on 30th November 1921, and which money was entrusted to the "accused by the complainant through the ordinary course of business." I do not see how reading those two charges it can be said that Major Holt White did not know, or could not know, that he had made over this money to the accused when he brought the first charge. Be that as it may, I am of

1923

NAGENDRA NATH BOSE v. EMPEROR.

opinion that, on the general question of law that is raised, the plea of *autre fois acquit* must prevail, and this rule must be made absolute.

Owing to the difference of opinion between their Lordships the case was referred to Greaves J. as the third Judge.

Babu Dasarathi Sanyal (with him *Babu Tarakeswar Pal Chowdhry* and *Babu Phanindra Nath Mukherjee*), for the petitioner. The accused was acquitted of criminal breach of trust of a larger sum committed between 1st October 1921 and 1st March 1922; and cannot be tried again for the same offence, in respect of a different sum misappropriated during the same period. Under s. 222 (*2*) of the Criminal Procedure Code, the second offence was included in the first one. Refers to *In re Appadurai Ayyar* (1), *Cr. Rev. 934 of 1919* (2), decided by Chaudhuri and Newbould JJ. on 28th November 1919. The subsequent discovery does not affect the question. The case of *Emperor* v. *Jhabbar Mull Lakkar* (3) is almost similar. Distinguishes *Emperor* v. *Kashinath Bagaji Sali* (4). The whole case is now before the Court: *Sarat Chandra Mitra* v. *Emperor* (5).

Mr. S. Chakravarti, for the Crown. The subsequent prosecution is not barred under s. 403. The misappropriation of the item of Rs. 100 could not have been discovered at the first trial. Refers to *Radha Kissen Goenka* v. *Fateh Chand Borah* (6). The period of time is not the essential point of the offence. Relies on *Emperor* v. *Kashinath Bagaji Sali* (4). Section 222 (*2*) of the Code does not require the gross sum to include all the items defalcated during

(1) (1915) 17 Cr. L. J. 30.
(2) Unreported.
(3) (1922) I. L. R. 49 Calc. 924.
(4) (1910) 12 Bom. L. R. 226.
(5) (1910) I. L. R. 38 Calc. 202.
(6) (1918) 23 C. W. N. 543.

a certain period. Comments on *In re Appadurai Ayyar* (1), and distinguishes *Cr. Rev. 934 of 1919* (2).

Babu Dasarathi Sanyal, in reply.

1923

NAGENDRA NATH BOSE v. EMPEROR.

GREAVES J.

GREAVES J. This matter comes before me by reason of a difference of opinion between Mr. Justice Newbould and Mr. Justice Suhrawardy. The facts are as follows :—

The petitioner was charged at the Criminal Sessions held in Calcutta in August 1922, under section 409 of the Indian Penal Code, with criminal breach of trust in respect of a sum of Rs. 18,924-4 alleged to have been misappropriated by him between the 1st October 1921 and the 1st March 1922. The charge was withdrawn with the leave of the Court, on the 28th August 1922, as no evidence was offered. This in law amounts to an acquittal.

The petitioner is now being prosecuted at the instance of the complainant, who was also the complainant in the previous matter, for criminal breach of trust as a servant, under section 408 of the Indian Penal Code, in respect of a sum of Rs. 100, alleged to have been misappropriated by the petitioner, on the 30th November 1921, that is to say, within the period covered by the charge under section 409 in respect of the sum of Rs. 18,924-4.

The prosecution alleged that the sum of Rs. 100 was not included in the sum of Rs. 18,924-4, and that the facts relating thereto were not known to them at the time of the previous charge, and the matter has been argued on this basis.

It is contended on behalf of the petitioner that he is now being charged with the same offence of which he was acquitted at the previous trial, and that, having regard to the provisions of section 222 (*2*) of the

(1) (1915) 17 Cr. L. J. 30. (2) Unreported.

1923

NAGENDRA NATH BOSE v. EMPEROR.

GREAVES J.

Code of Criminal Procedure, he cannot now be charged with any misappropriation between the 1st October 1921 and the 1st March 1922, as any misappropriation between that period, whether included in the gross sum or not, is one offence by reason of the provisions of the sub-section. This is the view taken in *In re Appadurai Ayyar* (1).

On behalf of the Crown it is contended that section 222 (2) only dispenses with the particulars which otherwise would be required, but that it does not say that the gross sum is to include every act of misappropriation committed within the dates specified in the charge. It is urged that the essence of the offence is the misappropriation, and not the time within which it took place, and that, as the Rs. 100, the subject of the present charge, was not included in the gross sum, the offence now charged is not the same as that in respect of which the petitioner was previously acquitted. This is the view taken in *Emperor* v. *Kashinath Bagaji Sali* (2). With this view, and with the reasoning of Chandavarkar J. in his judgment in that case, I respectfully agree.

In the result, I agree with Mr. Justice Newbould that the Rule should be discharged.

E. H. M. *Rule discharged.*

(1) (1915) 17 Cr. L. J. 30.

(2) (1910) 12 Bom. L. R. 226.