1923

SEODOYAL KHEMKA v. JOHARMULL MANMULL.

PAGE J.

I have come to the conclusion that Sukdeo was not a partner in any sense in the firm of Nathuram Ramkissen, although there is some evidence that as between the father and the two sons, the father was jointly interested in their shares. That is sufficient to dispose of this case. The contentions put forward on behalf of defendants 1 and 3, in my opinion, fail, and there is no defence to this action.

Attorneys for the plaintiffs: *Khaitan & Co.*
Attorney for defendants 1 to 3: *S. C. Mukherjee.*
Attorneys for defendants 4 and 5: *Dutt & Son.*
Attorney for defendant 6: *G. B. Chatterjee.*

N. G.

CRIMINAL REVISION.

Before Newbould and Suhrawardy JJ.

1923.

Feb. 6.

TULSI TELINI

v.

EMPEROR.*

Charges—Trial on a charge under s. 380 of the Penal Code—Conviction under s. 54A of the Calcutta Police Act (Beng. IV of 1866)—Legality of conviction—Reason to believe that the property was stolen—Criminal Procedure Code (Act V of 1898), ss. 236 and 237.

An accused may be charged in the alternative, under s. 236 of the Criminal Procedure Code, with offences falling within s. 380 of the Penal Code and s. 54A of the Calcutta Police Act (Beng. IV of 1866), and convicted, under s. 237 of the Criminal Procedure Code, of the latter offence, though not separately charged therewith.

Manhari Chowdhuri v. *King Emperor* (1) referred to.

* Criminal Revision No. 1076 of 1922 against the order of A. Z. Khan, Fourth Presidency Magistrate, dated Dec. 2, 1922.

(1) (1917) 22 C. W. N. 199.

1923

TULSI TELINI v. EMPEROR.

There must be reason to believe that property found in the possession of an accused was stolen, as a preliminary condition, before he can be called upon to account for such possession under s. 54A of the Calcutta Police Act. A finding that the accused gave a goldsmith some old ornaments to be melted down and converted into new ones of a different type under suspicious circumstances, is a sufficient ground for such belief, and may support a conviction under s. 54A when coupled with a finding that he did not give a satisfactory account of his possession of them.

Queen-Empress v. *Dhanjibhai Edulji* (1), *Sukhu Kalwar* v. *King-Emperor* (2), *Bai Das* v. *Alim Bux Khan* (3) referred to.

ON the 24th April 1922 a trunk containing gold and silver ornaments, some cloths and a sum in cash, to the total value of Rs. 18,000, was stolen from the room of the complainant, Ram Khilawan Ahir, in the town of Calcutta. Information was given to the police the next day, and an investigation followed. The accused occupied a room in the same flat. It appeared that, on the 24th, 25th and 26th April, she paid a sum of Rs. 3,265 to her creditors. On the 19th July the police recovered some ornaments from a goldsmith named Beni Madhab Das which, the latter alleged, had been given him by the accused, the previous month, to be melted down and converted into new ornaments of a different type. He stated that on one day alone 67½ tolas of broken gold were handed over by her to be melted down and made into ornaments. The accused was arrested in August last, and put on trial before the Fourth Presidency Magistrate. A charge was framed against her, under s. 380 of the Penal Code, in respect of the contents of the trunk. A summary of the evidence recorded against her is set out in the judgment of the High Court. The accused filed a written statement alleging that the money paid to her creditors and the ornaments given to the goldsmith were her own property, and that the latter

(1) (1895) I. L. R. 20 Bom. 348. (2) (1918) 22 C. W. N. 936.
(3) (1919) 23 C. W. N. 1053.

1923

TULSI TELINI v. EMPEROR.

were made over to the goldsmith for the preparation of new ornaments for her son's intended bride. The Magistrate found that the identity of the ornaments and cash, as belonging to the complainant, was not established, but he held that there were reasons to suspect them to be stolen property, and that the accused had not given a satisfactory explanation of her possession of them. He convicted her under s. 54A of the Calcutta Police Act,* and sentenced her to three months' rigorous imprisonment.

The accused thereupon moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee (with him *Babu Jatindra Nath Mukerjee*), for the petitioner. The accused could not be tried at one trial for the offences under s. 380 of the Penal Code and s. 54A of the Calcutta Police Act. They are distinct offences and do not fall within ss. 236 and 237 of the Criminal Procedure Code. Distinguishes *Manhari Chowdhuri* v. *King-Emperor* (1). The accused was prejudiced by the conviction under s. 54A. She had no opportunity of producing evidence to meet the charges under this section. The Magistrate had no reasonable grounds on the facts, for the belief that the money and ornaments were stolen property. Refers to *Sukhu Kalwar* v. *King-Emperor* (2), *Bai Das* v. *Alim Bux Khan* (3), *Queen-Empress v. Dhanjibhai Edulji* (4).

* *Beng. Act IV of 1866 s. 54A.*—(1) Whoever has in his possession, or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe to have been stolen or fraudulently obtained shall, if he fails to account for such possesion or act to the satisfaction of the Magistrate, be liable to fine which may extend to one hundred rupees, or to imprisonment, with or without hard labour, for a term which may extend to three months.

(1) (1917) 22 C. W. N. 199.
(2) (1918) 22 C. W. N. 936.
(3) (1919) 23 C. W. N. 1053.
(4) (1895) I. L. R. 20 Bom. 342.

1923

TULSI TELINI v. EMPEROR.

Babu Dasarathy Sanyal, for the Crown. The accused might have been charged under the Police Act Section 236 of the Criminal Procedure Code applies: *Manhari Chowdhuri* v. *King-Emperor* (1). The conviction is also good under s. 238. The offence under s. 54A is minor to theft and to dishonestly receiving stolen property under s. 411 of the Penal Code, of which she might have been convicted on a charge under s. 380 of the Penal Code.

NEWBOULD AND SUHRAWARDY JJ. The petitioner, Tulsi Telini, has been convicted of an offence punishable under section 54A of Act IV of 1866 (Calcutta Police Act). That section runs as follows: "Whoever "has in his possession, or conveys in any manner, "or offers for sale or pawn, anything which there is "reason to believe to have been stolen or fraudulently "obtained, shall, if he fails to account for such pos- "session or act to the satisfaction of the Magistrate, be "liable to fine, etc." At the trial the only charge framed against her was that she committed theft in respect of gold and silver ornaments, cloths and cash Rs. 13,410 in G. C. Notes, sovereigns and coins valued in all about Rs. 18,000 from the room of one Khilawan Ahir, and thereby committed an offence punishable under section 380 of the Penal Code. This rule has been granted on two grounds. The first relates to the legality of the conviction under section 54A of the Calcutta Police Act on the charge framed, the other to the legality of the conviction under this section on the facts found.

As regards the first ground it is contended on behalf of the Crown that sections 237 and 238 of the Criminal Procedure Code render the conviction legal. We are of opinion that the provisions of section 237 of the

(1) (1917) 22 C. W. N. 199.

1923

TULSI TELINI v. EMPEROR.

Criminal Procedure Code alone are sufficient, and it is, therefore, unnecessary to consider whether the offence punishable under section 54A of the Calcutta Police Act is a minor offence to that of retaining stolen property punishable under section 411 of the Penal Code. Nor need we consider whether the double operation of sections 237 and 238 can be invoked to support the contention that, since section 237 would render an accused liable to conviction under section 411 on a charge of theft, he could also, on such a charge, be convicted of an offence that is minor to one punishable under section 411 of the Penal Code.

Clause (1), section 237 of the Criminal Procedure Code, runs as follows:—"If, in the case mentioned in "section 236, the accused is charged with one offence, "and it appears in evidence that he committed a "different offence for which he might have been charged "under the provisions of that section, he may be con- "victed of the offence which he is shown to have com- "mitted, although he was not charged with it."

The *Illustration* to this section is: "*A* is charged "with theft. It appears that he committed the offence "of criminal breach of trust, or that of receiving "stolen goods. He may be convicted of criminal "breach of trust, or of receiving stolen goods, (as the "case may be), though he was not charged with such "offence." It thus appears that the legality of a conviction for an offence not charged depends, when reliance is placed on section 237, on whether the different offence of which the accused has been convicted is one for which he might have been charged under the provisions of section 236 of the Criminal Procedure Code which is in the following terms: "If "a single act or series of acts is of such a nature that "it is doubtful which of several offences the facts

"which can be proved will constitute, the accused "may be charged with having committed all or "any of such offences, and any number of such "charges may be tried at once; or he may be charged "in the alternative with having committed some one "of the said offences". In the present case the prosecution based their case on a series of acts of a suspicious nature, and asked the Court to draw an inference from those acts that the accused had herself committed theft of the articles mentioned in the charge from the room of Khilawan Ahir. But if, from the facts proved in support of this charge of theft, it was doubtful whether the Court would draw the inference, and the Court might draw the inference that an offence punishable under section 54A of the Calcutta Police Act had been committed, the accused might have been charged at the trial with both these offences under section 236, and this conviction would be in accordance with the provisions of section 237 of the Criminal Procedure Code.

In addition to the evidence of the theft, evidence of suspicious acts is set out at length in the judgment of the trying Magistrate and classified under four heads. Stated shortly, the *first* is evidence of the complainant's daughter-in-law that the accused obtained possession of the key and padlock of the door which separated her room from the room of the complainant in which the theft was committed. The *second* is evidence of large payments by the accused to creditors about the time of the theft. The *third* is evidence of the accused pledging ornaments and attempting to change notes for Rs. 1,000. The *fourth* is evidence that the accused gave a goldsmith old ornaments to be melted down under suspicious circumstances. The evidence as to the first and third series of these suspicious acts has been disbelieved,

1923

TULSI TELINI v. EMPEROR.

and that as to the second and fourth believed, by the Magistrate.

This being the case for the prosecution, we hold that section 236 was clearly applicable. In the words of that section the series of acts was of such a nature that it was doubtful which of several offences the facts which could be proved would constitute. If all the acts alleged had been proved facts, the Court might have convicted the accused of theft, or might even, in that case, have refused to draw the inference that the accused was the actual thief. That a charge under section 54 A of the Calcutta Police Act might have been joined with a charge of theft under the provisions of section 236 of the Criminal Procedure Code, was held by this Court in the case of *Manhari Chowdhuri* v. *King-Emperor* (1). It is true, as contended on behalf of the petitioner, that in that case the point decided was the applicability of section 403 of the Criminal Procedure Code, and that the facts are distinguishable in one important particular. But even regarded as an *obiter dictum* this judgment, read as a whole, shows that another Divisional Bench of this Court interpreted sections 236 and 237 of the Criminal Procedure Code the same way that we do. For the above reasons we hold that the accused could have been tried, under the provisions of section 236, on charges of offences punishable under section 380 of the Penal Code and section 54A of the Calcutta Police Act, and that, therefore, under section 237, she could be convicted of the offence punishable under the latter section, though she was not charged with it.

It is also contended that the power of the Magistrate to apply section 237 of the Criminal Procedure Code, is discretionary, and that it should not have been applied in the present case, since the result has been to

(1) (1917) 22 C. W. N. 199.

1923

TULSI TELINI v. EMPEROR.

prejudice the accused in her defence. We hold that she has not been prejudiced. On the charge framed she was required to account for the possession of the ornaments which she gave to the goldsmith to be melted. Whether these were stolen property and whether she could account for their possession were as important issues on the charge framed as they are on the charge of which she has been convicted. We, therefore, hold that the first ground on which this rule was granted has not been established.

The rule was granted on the second ground to enable us to examine whether the conviction was in accordance with the principle laid down in *Queen-Empress* v. *Dhanjibhai Edulji* (1), *Sukhu Kalwar* v. *King-Emperor* (2) and *Bai Das* v. *Alim Bux Khan* (3), that there must be reason to believe that the property found in the accused's possession was stolen property, as a preliminary condition, before the accused can be called on to account for that possession. In the present case the accused's conduct on making over the 67½ tolas of gold ornaments to be melted is sufficient to give reason to believe that she was in possession of stolen property. This preliminary condition was, therefore, fulfilled in the present case, and with the Magistrate's finding that she has not given a satisfactory explanation of the possession of these ornaments, is sufficient to support the conviction.

We, therefore, discharge this rule. The petitioner must surrender to her bail and undergo the unexpired portion of her sentence.

E. H. M. *Rule discharged.*

(1) (1895) I. L. R. 20 Bom. 348. (2) (1918) 22 C. W. N. 936.
(3) (1919) 23 C. W. N. 1053.