CRIMINAL REVISION.

Before Sanderson C.J. and Panton J.

1922

June 1.

RADHA NATH KARMAKAR

v.

EMPEROR.*

Charges—Joinder of distinct offences in one head—Effect of the illegal joinder— Criminal Procedure Code (Act V of 1898) s. 233.

A single head of charge alleging offences under ss. 323 and 325, read with s. 149 of the Penal Code, and a single head of charge of several offences under s. 353, the offences mentioned in the two charges having been committed against different persons in the course of the same transaction, are illegal as contravening the terms of s. 233 of the Criminal Procedure Code, and the High Court, to be on the safe side, set aside the convictions on the charges

The illegality, however, of joining in one head of charge several offences which were committed in the same transaction, and could have been charged under s. 235 of the Code, in separate heads, and evidence of which would have been admissible if they had been so charged, is not one which vitiates the whole trial; and the conviction, therefore, under the remaining charge, which was not open to objection, must stand.

Subrahmania Ayyar v. *King-Emperor* (1) distinguished.

THE facts of the case were that a general strike of workmen employed in the Assam-Bengal Railway took place at the end of May 1921. Several of the strikers had resumed work, and others had determined to do so on the 25th July. In the morning of the latter date Raghubir, a *havildar*, accompanied with several constables, were escorting some strikers to

* Criminal Revision No. 227 of 1922, against the order of J. Johnston, Sessions Judge of Chittagong, dated Feb. 7, 1922.

(1) (1901) I. L. R. 25 Mad. 61.

work on a road between the villages of Nasirabad and Sariapara, in the district of Chittagong, when they were attacked by the petitioners and others and were wounded.

The accused were placed on trial before the Additional District Magistrate of Chittagong, and were all charged under s. 147, and ss. 323, 325, read with s. 149, of the Penal Code. Some were further charged under s. 353 of the same Code. The first charge alleged that they were guilty of rioting, under s. 147 of the Code, with the common object of compelling, by means of force or a show of force, certain named strikers to refrain from resuming work. The second charge is set out in the judgment of the High Court. The third alleged assault by some of the accused committed on the *havildar* and three of the constables, and falling under s. 353 of the Code.

The Magistrate convicted the accused of the offences charged and sentenced them, under s. 147 only, to various terms of imprisonment, and he made a further order binding them down under s. 106 of the Criminal Procedure Code. On appeal, the Sessions Judge of Chittagong acquitted two, and upheld the conviction of the rest. The latter thereupon moved the High Court and obtained a Rule on the first ground, which is quoted in the judgment of the Court.

Babu Dasarathi Sanyal (with him *Babu Debendra Narain Bhuttacharjee*), for the petitioners. The second and third charges are illegal under s. 233. Separate charges should have been framed. The whole trial is bad: see *Subrahmania Ayyar* v. *King-Emperor* (1) as to the first count. Refers to *Gul Mahomed Sircar* v. *Cheharu Mandal* (2), *Johan*

(1) (1931) I. L. R. 25 Mad. 61. (2) (1905) 10 C. W. N. 53.

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Subarna v. *King-Emperor* (1), *Tilakdhari Das* v. *Emperor* (2), *Asgar Ali Biswas* v. *Emperor* (3).

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. The joinder of distinct offences in one charge is not an illegality which voids the whole trial within the meaning of the Privy Council case. It does not affect the charge under s. 147 of the Penal Code.

SANDERSON C. J. This is a Rule calling upon the District Magistrate to show cause why the convictions of, and sentences passed upon, the petitioners should not be set aside on the first ground mentioned in the petition; and the first ground is that "the trial "of the petitioners, on charges framed in contravention "of section 233 of the Criminal Procedure Code, was "without jurisdiction and void, and the convictions "had and sentences and orders under section 106 "of the Criminal Procedure Code passed on such trial "are illegal and fit to be quashed."

The charges (as they appear from the petition) against the petitioners, who are 14 in number, were, first, under section 147 of the Indian Penal Code, secondly, under section 149 read with sections 325 and 323, and, thirdly, against some of the petitioners under section 353 of the Indian Penal Code. The learned vakil for the petitioners raised no objection to the charge under section 147 of the Indian Penal Code, and that is the section under which the petitioners have been sentenced. Some of the petitioners have been convicted in respect of the other charges, but no separate sentences have been passed in respect thereof.

The objection, which the learned vakil for the petitioners has raised on this Rule, may be illustrated

(1) (1905) 10 C. W. N. 520 (2) (1907) 6 C. L. J. 757.
(3) (1913) I. L. R. 40 Calc. 846.

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by way of reference to the charge under section 149 of the Indian Penal Code. It was stated in the petition as follows:—

"That you, on or about the 25th day of July, 1921, "at the same place were members of an unlawful "assembly and in prosecution of the common object of "that assembly, as stated in the first charge, several "members of the said assembly caused grievous hurt "to *havildar* Raghubir Rout, and simple hurt to con- "stable Prem Lal Ghose, constable Har Kishore Barua, "constables Mahendra Chandra De, Yar Ali Matbar, "Abdul Rashid and Oli Mia Doctor, and you are thereby "under section 149 of the Indian Penal Code, guilty "of causing the said offences which are punishable, "under sections 325 and 323 of the Indian Penal Code."

The learned vakil for the petitioners has argued that that charge is a bad charge for the reason that it contains more than one distinct offence and he has relied upon section 233 of the Code of Criminal Procedure. That section provides: "For every distinct "offence of which any person is accused, there shall be "a separate charge, and every such charge shall be tried "separately, except in the cases mentioned in sections "234, 235, 236 and 239."

That charge, in my judgment, did relate to more than one distinct offence, and, consequently, it is a bad charge under the law. For that reason, in my judgment, the learned vakil's argument to that extent is well-founded. But when he went further and argued that, because that particular charge was in contravention of section 233, the whole trial was vitiated, I, with great respect to the learned vakil's argument, was unable to agree with it. The distinct offences, which were included in that particular charge, were one series of acts so connected together as to form the same transaction and consequently the accused could

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have been charged with, and tried at one trial for, each such offence, *see* section 235 of the Criminal Procedure Code, and the evidence relating thereto could have been presented to the Court by the prosecution if those distinct offences had been contained in separate charges. It seems to me to be an entirely different case to that which was decided by the Judicial Committee of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1), upon which the learned vakil relied. That was a case where the accused was tried on an indictment, in which he was charged with no less than 41 acts, these acts extending over a period of two years. This was clearly in contravention of section 234 of the Criminal Procedure Code which provides that a person may only be tried for three offences of the same kind if committed within a period of twelve months. The Judicial Committee held that the whole trial was vitiated; and the reason for holding that the whole trial was vitiated was set out by the Lord Chancellor in his judgment. The Lord Chancellor, referring to section 234, observed, "The reason of such a provi-"sion, which is analogous to our own provisions in "respect of embezzlement, is obviously in order that "the Jury may not be prejudiced by the multitude of "charges and the inconvenience of hearing together "of such a number of instances of culpability and "the consequent embarrassment both to Judges and "accused." But, here, as I have already pointed out, the alleged offences were a series of acts arising out of one and the same transaction, and there was nothing to prevent all these matters being put before the Court if they had been contained in separate charges instead of their being included in one charge. Consequently,

(1) (1901) I. L. R. 25 Mad. 61.

there is a great difference between the present case and the case which was decided by the Judicial Committee. The same remarks apply to the charge under section 353. It seems to me that the charge as framed did relate to distinct offences, because, there the allegation was that the accused, referred to in that charge, did assault the *havildar* and several constables who are named in the charge. Strictly speaking there should have been separate charges in respect of these distinct offences. Consequently, in my judgment, we shall be on the safe side in setting aside the convictions under section 149 read with sections 325 and 323, and the convictions under section 353 of the Indian Penal Code. But there is no reason, in my judgment, why the conviction under section 147 of the Indian Penal Code should not stand.

Then, the only other point to which I need refer is the question of sentence. The learned vakil has drawn our attention to the fact that the learned Magistrate who tried the case, based his decision, as regards the sentences, to some extent, at all events, upon the fact that some of the accused persons had been convicted of offences other than the offence under section 147, and, consequently, the sentences ought to be reconsidered. It seems to me that if there had been one charge only framed against the accused under section 147, all the facts which were proved at the trial in relation to this matter would have been material. The learned vakil agreed that the Magistrate, in imposing the sentences, would have been justified in taking into consideration the various parts which were played by the accused persons respectively. In my judgment, if he had done so, there is nothing to show that he would have come to any conclusion different from that at which he has arrived. For these reasons, in my judgment, there is no ground for interfering with the

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sentences, which, having regard to the nature of the case, are not unreasonable.

The result is that this Rule is made absolute to this extent, namely, that the convictions under section 149 read with sections 325 and 323 of the Indian Penal Code, and the convictions under section 353 of the Indian Penal Code, are set aside. The convictions under section 147 of the Indian Penal Code and the sentences imposed thereunder must stand.

PANTON J. I agree.

E. H. M.

APPELLATE CIVIL.

Before Mookerjee and Chotzner JJ.

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June 1.

SARADINDUNATH RAY CHOWDHURY

v.

SUDHIR CHANDRA DAS.*

Will—Sound disposing mind—Testamentary capacity—Testator in health instructed for will and in illness executed it—Slight proof of knowledge and approval sufficient—Principle of continuity, whether applicable—Succession Act (X of 1865), s. 48.

Where a testator instructed his lawyer to draw up a will two months prior to its execution and at the time of execution he fell very ill, but was conscious, understood the provisions of the will when put to him, expressed his assent by monosyllables and affixed his initials to the will :—

Held, that the District Judge had correctly applied to this case the standard of testamentary capacity formulated in *Parker* v. *Felgate* (1), namely, that where a testator had given instructions for the will while in

* Appeal from Original Decree, No. 22 of 1920, against the decree of S. E. Stinton, District Judge of Dacca, dated Jan. 17 and 19, 1920.

(1) (1883) 8 P. D. 171.