CRIMINAL REVISION.

Before Suhrawardy and Jack JJ.

JNANADACHARAN GHATAK

v.

EMPEROR.*

1929

July 25.

Abetment—Conviction for abetment, if proper without charge—Code of Criminal Procedure (Act V of 1898), s. 237—Indian Penal Code (Act XLV of 1860), s. 420/104.

It cannot be definitely laid down that a person, having been charged with a substantive offence, cannot be convicted for abetment thereof. If the facts justify the conviction for abetment, there is no bar in law to such conviction. The principle is that, if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which constitute abetment, he cannot be convicted of abetment.

Per JACK J. A person can be convicted of abetment without a separate charge, where the circumstances bring the case under section 237 of the Criminal Procedure Code.

Hulas Chand Baid v. *Emperor* (1) dissented from.

Reg. v. *Chand Nur* (2), *Indar Chand* v. *Emperor* (3), *King-Emperor* v. *Kadira* (4), *Emperor* v. *Mahabir Prasad* (5), *Dibakar Das* v. *Saktidhar Kabiraj* (6), *Padmanabha Panjikannaya* v. *Emperor* (7), *Emperor* v. *Raghya Nagya* (8) and *Begu* v. *The King-Emperor* (9) referred to.

RULE obtained by Jnanadacharan Ghatak, accused.

The petitioner and others, including one Wazuddi Fakir, were put upon their trial before Maulvi A. Majid, Deputy Magistrate, Madaripur, on charges under sections 420 and 420, read with section 120B, of the Indian Penal Code. The case for the prosecution was that one Alekjan Bibi inherited in part some lands left by her father. Owing to family reasons, Alekjan found it inconvenient to look after her lands and, desiring to sell the same, consulted Wazuddi, who was her uncle. Wazuddi gave her to

*Criminal Revision, No. 131 of 1929, against the order of T. H. Ellis, Sessions Judge of Faridpur, dated Jan. 14, 1929, confirming the order of A. Majid, Magistrate of Madaripur, dated Sep. 18, 1928.

(1) (1926) 44 C. L. J. 216.
(2) (1874) 11 Bom. H. C. R. 240.
(3) (1915) I. L. R. 42 Calc. 1094.
(4) (1928) D. R. 2 of 1928 decided on 13th March.
(5) (1926) I. L. R. 49 All. 120.
(6) (1927) I. L. R. 54 Calc. 476.
(7) (1909) I. L. R. 33 Mad. 264.
(8) (1924) 26 Bom. L. R. 323.
(9) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 191.

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understand that one Mahendranath Pal, the *zemindâr* of Bhojeshwar, was willing to purchase her lands for Rs. 300. Alekjan went to the office of the Sub-Registrar of Palong, where the petitioner Jnanadacharan Ghatak was a deed writer. He wrote out a sale deed in favour of Wazuddi's wife. When Alekjan wanted the consideration money for the sale, Wazuddi showed her a bundle, which he said contained Rs. 300 which would be paid to her after the registration. The deed was, accordingly, registered. The petitioner, Jnanadacharan, brought the receipt from the Sub-Registry office and gave it to Wazuddi. Wazuddi then took Alekjan behind a hut and gave her the bundle and asked her to wait until she was in the boat and then count the money. She, however, opened the bundle after going a short distance and found that it contained only pice, worth Rs. 5 13 annas and 3 pies. She raised an outcry and people gathered there. She, then, went to the Sub-Registrar and told him the whole story. The defence was that she was actually paid Rs. 300, but brought this false case, at the instigation of a person, who desired to purchase the property himself. The case of Jnanadacharan was that he wrote out the *kabâlâ* quite innocently and was not aware of any fraud being practised by Wazuddi. On the evidence, the trial court found that the petitioner, in whose hut the whole transaction took place, was aware that the bundle contained only pice, worth Rs. 5 and odd. The court further found that the petitioner was told by Alekjan that she was selling her lands to Mahendra Babu. The trial court convicted Wazuddi under section 420 of the Indian Penal Code and the petitioner and another accused person under section 420 read with section 114, although there was no separate charge for the same. It acquitted all the accused of the charge under section 420 read with section 120B on the ground that there was no direct evidence on the record to sustain that charge. An appeal to the Sessions Judge of Faridpur was dismissed. The petitioner, thereupon, obtained the present Rule.

Mr. Sureshchandra Talukdar (with him *Mr. Amritalal Mukherji*), for the petitioner. The conviction of the petitioner on a charge of abetment, when he was charged only with the substantive offence, is clearly illegal. The case of *Hulas Chand Baid* v. *Emperor* (1) is a direct authority on the point. See also *Padmanabha Panjikannaya* v. *Emperor* (2) and *Emperor* v. *Raghya Nagya* (3). The recent addition of sub-section (2A) to section 238 of the Criminal Procedure Code by the amendment of 1923 lends support to that view. By sub-section (2A), it is specifically provided that an accused person can be convicted of an attempt to commit an offence, when he is charged with the substantive offence. The omission to include abetment in that sub-section must be taken to be intentional and in support of the view that a conviction for abetment in similar circumstances is illegal.

Mr. Nirmalchandra Chakravarti, for the Crown. It cannot be laid down as a general proposition that in no case, there can be conviction for abetment without a charge. In the recent case of *King-Emperor* v. *Kadira* (4), it was held that such conviction is sustainable. The real question is whether it comes within section 237 of the Criminal Procedure Code and whether the accused has been prejudiced thereby. The case of *Hulas Chand Baid* v. *Emperor* (1) makes no reference to section 237. There cannot be any question of prejudice in this case inasmuch as the accused was charged with conspiracy.

Mr. Talukdar, in reply.

SUHRAWARDY J. The only question of law argued before us, on behalf of the petitioner, is that his conviction for abetment of the substantive offence, though he was not charged with it originally, is erroneous in law. Three persons were tried on a charge under section 420 of the Indian Penal Code. The petitioner is the third accused and he is said to

(1) (1926) 44 C. L. J. 216.
(2) (1909) I. L. R. 33 Mad. 264.
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have taken part in carrying out the purpose of the cheating. They were further charged under section 120B for conspiracy. The facts are that one Alekjan Bibi was induced to sell her property to the first accused Wazuddi under circumstances, which made it a clear case of cheating. She was told that she was to execute a *kabâlâ* in favour of some one else for Rs. 300. As a matter of fact, the *kabâlâ* was written in favour of Wazuddi to the knowledge of the petitioner and a bundle of money purporting to be rupees three hundred was made over to Alekjan Bibi. It was subsequently found to contain small coins and pice worth Rs. 5. On these facts, as elaborated in the evidence, the accused were charged under sections 120B and 420 of the Indian Penal Code. The petitioner was convicted under section 420, read with section 114 of the Indian Penal Code and sentenced to three months' rigorous imprisonment, though there was no charge framed under section 114. It is argued that there being no such charge against the accused, he could not be convicted under that section. There is some divergence of opinion on the question as to whether a person having been charged with a substantive offence can be convicted for abetment thereof. It is not necessary to refer to all the various cases that have been cited before us upon this point, for I think the right view of the question raised before us is that it cannot be definitely laid down that a person having been charged with a substantive offence cannot be convicted for abetment thereof. Every case depends upon its own facts and if the facts justify the conviction for abetment, though the person was charged with the commission of the offence itself, there is no bar in law to such conviction. The principle is what was laid down long ago in *Reg* v. *Chand Nur* (1), where it is said that if evidence adduced in support of the charge for the substantive offence does not give notice to the accused of all the facts which would constitute abetment, he cannot be convicted of

(1) (1874) 11 Bom. H. C. R. 240.

abetment. This question was considered in the case of *Indar Chand* v. *Emperor* (1), and Mr. Justice Woodroffe who was the third Judge, to whom the case was referred on account of difference of opinion between two Judges, observed "I am not prepared "to hold as a universal rule that in no case can there be "a conviction for abetment where the charge is only for "the principal offence." The same view has been expressed in the unreported case of the *King-Emperor* v. *Kadira* (2) by C. C. Ghose J. in these words :—"It "is true that there was no charge of abetment of "murder against the present appellant before the "jury, but in my opinion it cannot be laid down as a "universal rule that in no circumstances whatsoever "where there is a charge for a substantive offence and "there is no charge of abetment of that offence can the "person so charged with substantive offence be "convicted of abetment of that offence." The same view has been expressed in *Emperor* v. *Mahabir Prasad* (3) and *Dibakar Das* v. *Saktidhar Kabiraj* (4). A great deal of support for this view is to be obtained from the decision of the Judicial Committee in *Begu* v. *The King-Emperor* (5), where the accused was charged under section 302 of the Indian Penal Code, but convicted under section 201 for destroying the evidence of the commission of that offence. Their Lordships remarked :—"A man may be convicted of an "offence, although there has been no charge in respect "of it, if the evidence is such as to establish a charge "that might have been made." I must, therefore, submit with great respect that the view, taken in *Hulas Chand Baid* v. *Emperor* (6), by one of the Judges and adopted by the other Judge and couched in general language, is not supported by authority. There are some cases which have held to the contrary, but which seem to have proceeded only upon the reading of section 238 of the Code of Criminal

(1) (1915) I. L. R. 42 Calc. 1094, 1133.
(2) (1928) D. R. 2 of 1928 decided on 13th March.
(3) (1926) I. L. R. 49 All. 120.
(4) (1927) I. L. R. 54 Calc. 476.
(5) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 191.
(6) (1926) 44 C. L. J. 216.

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Procedure and make no reference to the other relevant section 237. *Padmanabha Panjikannaya* v. *Emperor* (1) and *Emperor* v. *Raghya Nagya* (2).

We have next to consider as to whether in the words of the Judicial Committee there is evidence such as to establish the charge of abetment and whether the accused has, by the absence of the charge of that offence, been prejudiced. The fact deposed to in the complainant's evidence and the evidence of her witnesses has been found by the Judge to be that the petitioner wrote the *kabâlâ* in the name of the first accused and the circumstances under which the money was actually made over to Alekjan show that the petitioner was a party to the cheating. He brought the receipt from the Sub-Registrar's office and made it over to the first accused. It was further proved that the petitioner was to make over the money to the complainant, but he refused to do so as there was a danger if the bundle was opened before the Sub-Registrar. These facts sufficiently prove that the petitioner was privy to the commission of the substantive offence by the first accused. Upon these facts the petitioner's conviction was based, and he had full notice that he had to meet these allegations in his defence.

The petitioner was further charged under section 120B. But it appears that no order was passed under that section by any of the courts below. We have, therefore, ample authority, under section 423 of the Criminal Procedure Code to alter the finding and convict the accused under section 120B on the finding of fact arrived at by the learned Sessions Judge who says—"It is clear that if Wazuddi "was to carry through his plot successfully, he would "need the help of some one to write the deed. The "circumstances under which the deed was written and, "in particular, the circumstances under which the "money was actually made over, show that Jnanada "must have been a privy to the plan." In any view

(1) (1909) I. L. R. 33 Mad. 264. (2) (1924) 26 Bom. L. R. 323.

of the case, the accused has been rightly convicted and sentenced.

The Rule is, therefore, discharged. The petitioner's bail bond should be cancelled. He must serve out the remainder of the sentence.

JACK J. I agree. I would only like to add that, in my opinion, whether a man can be convicted, without a separate charge, on a charge of abetment of the principal offence, depends upon the circumstances of the case. He can only be so convicted where the circumstances bring the case under section 237 of the Criminal Procedure Code. In the present case, I think the circumstances are such as to bring the case under section 237, and I think the court was justified in convicting the accused, inasmuch as the absence of a separate charge was not likely to prejudice the petitioner. I think, however, that in this particular case the trial court should have convicted the accused under section 120B of the Indian Penal Code. The learned Judge finds that there is no direct evidence to sustain the charge under section 120B against the four accused persons. It is not easy to understand what he means by this, inasmuch as the evidence on which he convicted the petitioner under sections 420/114, was in itself sufficient to convict him on the charge under section 120B. On the findings arrived at by both the courts below, the petitioner was clearly guilty under section 120B, and ought to have been convicted under that section. But inasmuch as the appellant has not been prejudiced by the procedure adopted it is not necessary for us to interfere.

Rule discharged.

A. C. R. C