remand to the lower appellate court for a proper investigation of that question and for a clear finding on it, we shall give the parties an opportunity to adduce such further materials as they may desire to do in connection with this question. All other questions that arose in the suit have now been concluded and the question referred to above is the only question that will be left open for consideration by the learned Subordinate Judge. On arriving at his finding on that question, he will proceed to dispose of the appeal in accordance with law.

Costs of this appeal will abide the result.

Appeal allowed: case remanded.

G. S.

CRIMINAL REVISION.

Before Suhrawardy and Mukerji JJ.

SIDH NATH AWASTHI

v.

EMPEROR.*

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Feb. 11.

Autrefois Acquit—*Principle, when can be extended to other cases—Criminal breach of trust, when a second trial should not proceed*—Chalan, *if a second one is competent—Seizin on transfer, if of the whole matter—Criminal Procedure Code (Act V of 1898), s. 403.*

There may be cases to which, though section 403 of the Code of Criminal Procedure does not strictly apply, yet on the principle underlying that section, a second trial should not be allowed to proceed.

Where a *chalan* was submitted against the accused to the effect that he had committed criminal breach of trust in respect of a gross sum but the trial was held with respect to only three particular items out of it, a second trial with respect to three other items included in the gross sum should not be allowed to proceed.

Inam-ullah v. *King-Emperor* (1), *Emperor* v. *Jhabbar Mull Lakkar* (2), *Bishun Das Ghosh* v. *King-Emperor* (3), *Jaliram Alom Ganburah* v. *Rajkumar Umar Singh* (4) and *Surja Kanta Bhattacharjya* v. *King-Emperor* (5) referred to.

*Criminal Revision, No. 1054 of 1928, against the order of S. A. Latif, Additional Chief Presidency Magistrate, Northern Division, Calcutta, dated Sep. 26, 1928.

(1) (1905) 2 A. L. J. 673.
(2) (1922) I. L. R. 49 Calc. 924.
(3) (1902) 7 C. W. N. 493.
(4) (1900) 5 C. W. N. 72.
(5) (1919) Cr. Rev. 934 of 1919, decided on 28th Nov.

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Where, however, the trial was over in spite of the objection of the accused to the trying magistrate about the competency of the second trial, the conviction was maintained, but the sentence was reduced to a nominal one.

There is a divergence of judicial opinion on the question whether after a trial in respect of a gross sum in respect of which breach of trust was alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on an intermediate date, but not included in the gross sum, is permissible.

In re Appadurai Ayyar (1), *Nagendra Nath Bose v. Emperor* (2), and *Emperor* v. *Kashinath Bagaji Sali* (3) referred to.

Obiter. When cognizance of an offence of criminal breach of trust for a gross sum is taken on one *chalan* and the case is transferred to another magistrate, a second *chalan* for the items included in the first *chalan* is not competent. The magistrate to whom the case was transferred might be moved for a second or a further trial.

Where a magistrate has once become properly seized of a case by transfer or otherwise, he is seized of the whole matter and a superior magistrate cannot take action except under Chapter XXXII of the Code or by withdrawal of the case to his own court.

Radhabullav Roy v. *Benode Behari Chatterjee* (4), *Moul Singh* v. *Mahabir Singh* (5), *Golapdy Sheikh* v. *Queen-Empress* (6) and *Ajab Lal Khirher* v. *Emperor* (7) referred to.

APPLICATION on behalf of accused, Sidh Nath Awasthi.

The material facts appear from the judgment of Mukerji J.

Mr. Prabodhchandra Chatterji, for the petitioner. The accused was sent up by the police *chalan* in the previous case for criminal breach of trust in respect of a gross sum of Rs. 3,651-5-3 and, according to the prosecution case in the present trial, the three items of money which form the subject matter of the present charge were included in the gross sum mentioned in the previous *chalan*. Hence section 403 of the Code of Criminal Procedure bars the present trial. The case of *Nagendra Nath Bose* v. *Emperor* (2) is distinguishable, inasmuch as there the subject matter of the second case was neither included in the first trial nor known to the prosecution at that time. In the present case, the Magistrate might have framed a charge with respect to the gross sum, but elected to charge the

(1) (1915) 17 Cr. L. J. 30.
(2) (1923) I. L. R. 50 Calc. 632.
(3) (1910) 12 Bom. L. R. 226.
(4) (1902) I. L. R. 30 Calc. 449.
(5) (1899) 4 C. W. N. 242.
(6) (1900) I. L. R. 27 Calc. 979.
(7) (1905) I. L. R. 32 Calc. 783.

accused with only 3 particular items. Even if it be assumed that the present case does not come strictly within the purview of section 403 of the Code of Criminal Procedure, on the principle underlying that section, the conviction and sentence should be set aside. On several occasions, the principle of that section was extended by the High Court to cases not coming strictly within its scope and the subsequent trial was stopped. In this case, objection was also taken at the earliest stage, but the Magistrate overruled it and proceeded with the trial. It cannot be the intention of the legislature that a servant should be put upon his trial as many times as are equal to the number of items of money misappropriated by him on different dates during the term of his office.

Mr. Satindranath Mukherji, for the Crown. Section 403 of the Code of Criminal Procedure does not apply to the facts of the present case. The previous conviction was for criminal breach of trust with respect to three particular sums or items which are different from the three items of the present case. Hence the offence with which the accused is charged in the present case is not " the same offence " of which he was convicted in a previous trial within the meaning of section 403. The mere mention of the gross sum of Rs. 3,651-5-3 in the summary form prescribed by section 370 of the Code of Criminal Procedure, cannot operate as a bar, because the charge as actually framed related to three particular items only. See *Emperor* v. *Kashinath Bagaji Sali* (1). In any case the accused should have moved against the order of the trying magistrate rejecting his application to stop the second trial. It is too late for him to take up the objection after the trial is finished and he is convicted.

MUKERJI J. On a *chalan* submitted by the police in which it was stated that the petitioner had, as a *durwan*, in the employ of Messrs. Sew Narayan Golap Ray, committed criminal breach of trust in respect of a gross sum of Rs. 3,651-5-3, the Additional Chief

(1) (1910) 12 Bom. L. R. 226.

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Presidency Magistrate of Calcutta issued warrant against the petitioner on the 19th July, 1927. On the 12th September, 1927, the case was transferred by the Additional Chief Presidency Magistrate to the 4th Court, that is to say to the Court of Mr. H. K. De, Presidency Magistrate. That learned Magistrate, thereafter, proceeded to try a co-accused of the petitioner, who had also been sent up for trial on the same police *chalan*, and discharged him under section 253 of the Code of Criminal Procedure. On the 15th November, 1927, the trial of the petitioner commenced before Mr. H. K. De, the offence specified in the summary form prescribed by section 370 of the Code of Criminal Procedure, being " criminal breach of trust " as a servant in respect of Rs. 3,651-5-3 realised on *purjas* entrusted to him by Ganpat Ray Chaudhuri " (the manager of Messrs. Sew Narayan Golap Ray), section 408 of the Indian Penal Code. Charges in respect of 3 items, viz., Rs. 257-8-3, Rs. 1,855-0-3 and Rs. 178-11-3, were framed against the petitioner as being the items in respect of which criminal breach of trust was committed by the petitioner on the 6th June, 1927, and the petitioner was convicted on these charges and was sentenced to undergo rigorous imprisonment for 3 months. The trial thus concluded before Mr. H. K. De, on the 8th February, 1928.

On the 14th April, 1928, another *chalan* was submitted by the police to the Additional Chief Presidency Magistrate, stating that the petitioner had committed criminal breach of trust of three sums of money, viz., Rs. 700, Rs. 100 and Rs. 100, on the 6th June, 1927, 25th May, 1927 and 24th May, 1927, respectively, the other particulars being the same as in the previous *chalan*. It was stated in the *chalan* that the petitioner was undergoing the sentence passed on him by Mr. H. K. De. The Additional Chief Presidency Magistrate issued order for the petitioner being brought up for trial. The petitioner put in a petition objecting to the trial on the ground that these three items were included in the gross sum of Rs. 3,651-5-3 and maintained that he had already

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been tried for the whole offence that he had committed, and so under section 403 of the Code of Criminal Procedure could not be tried again. The Additional Chief Presidency Magistrate disallowed the objection, proceeded with the trial and ultimately convicted the petitioner in respect of the said three items and sentenced him to undergo rigorous imprisonment for 3 months.

The petitioner then moved this Court and obtained this Rule. The grounds of the Rule are that section 403 of the Code of Criminal Procedure was a bar to the second trial of the petitioner, or, at any rate, on the principle underlying that section, no such second trial should have been held. It should be noted here that it is not disputed on behalf of the Crown that the three items, in respect of which the second trial was held, are included in the gross sum of Rs. 3,651-5-3, though they are not covered by any of the three items which formed the subject matter of the charges framed in the first trial.

At the outset, I may observe that I do not understand how the police could have submitted a second *chalan*, when on the first one, which included all the items of the second *chalan* in the gross sum that was mentioned therein, cognizance of the entire offence had already been taken by the magistrate. It is true that they might have moved the magistrate for a second or a further trial in respect of some offence or offences which had not yet been tried, but such application would lie to Mr. H. K. De, to whom the whole case, on the first *chalan* had been made over, and not to the Additional Chief Presidency Magistrate. It is well settled that, in circumstances such as these, it was Mr. H. K. De alone, so long as the case had not been retransferred from his file, who was competent to deal with any such application. Where a magistrate has once become properly seised of a case by transfer or otherwise, he is seised of the whole matter and a superior magistrate cannot take action except under Chapter XXXII or by withdrawal of the case to his

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own court: *Radhabullav Roy* v. *Benode Behari Chatterjee* (1), *Moul Singh* v. *Mahabir Singh* (2), *Golapdy Sheikh* v. *Queen-Empress* (3), *Ajab Lal Khirher* v. *Emperor* (4). Were this a ground on which the Rule had been issued, I should have felt no difficulty in making it absolute and quashing the conviction of the petitioner on this ground alone. To turn now to the grounds of this Rule.

Now, there is a divergence of judicial opinion on the question whether after a trial in respect of a gross sum in respect of which breach of trust was alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on an intermediate date, but not included in the gross sum, is permissible. In *In re Appadurai Ayyar* (5), the Madras High Court held that under such circumstances the charge in the first trial should be taken to have included all the items covered by the period and the same view was taken by Suhrawardy J. in *Nagendra Nath Bose* v. *Emperor* (6). A contrary view was taken by the Bombay High Court in the case of *Emperor* v. *Kashinath Bagaji Sali* (7). This contrary view also has been taken by Newbould and Greaves JJ. in the aforesaid case of *Nagendra Nath Bose* v. *Emperor* (6), in which, however, Newbould J. pointed out that it would make a considerable difference if it were shown that the defalcation which formed the subject of the charge in the second trial was within the knowledge of the prosecution and so could or might have been included in the charge in the first trial. These cases have but a remote bearing on the present case in which it is not the fact that the former trial was for a gross sum, and so I am not called upon to express my own view on this matter.

The present case is one in which the prosecution knew perfectly well what was the gross sum in respect of which the petitioner had committed criminal breach of trust. It was a sum of Rs. 3,651-5-3. They

(1) (1902) I. L. R. 30 Calc. 449.
(2) (1899) 4 C. W. N. 242.
(3) (1900) I. L. R. 27 Calc. 979.
(4) (1905) I. L. R. 32 Calc. 783.
(5) (1915) 17 Cr. L. J. 30.
(6) (1923) I. L. R. 50 Calc. 632.
(7) (1910) 12 Bom. L. R. 226.

could have, if they liked, proceeded against the petitioner in respect of this gross amount under section 222 (*2*) of the Code of Criminal Procedure. Instead of doing so, they elected to proceed on three items and got the petitioner convicted. Then they picked up three other items and got the accused tried a second time. Though section 403 of the Code of Criminal Procedure may not strictly apply in its terms to a case like the present, still there is abundant authority for the view that a second trial, in circumstances such as these, ought to have been allowed to be held. Where six documents were alleged to be fabricated at one and the same time, and at first the accused was tried for fabricating three of the documents and acquitted, a second trial for fabricating the other three documents, though not barred, was set aside, it being held that it was not desirable that the second trial should take place, as the fabricating of all the documents was treated in the first trial as one offence: *Inam-ulla* v. *King-Emperor* (1). The principle underlying section 403 has been often extended to cases not falling strictly within the letter of that section, for example, *Emperor* v. *Jhabbar Mull Lakkar* (2), *Bishun Das Ghosh* v. *King-Emperor* (3), *Jaliram Alom Ganburah* v. *Rajkumar Umar Singh* (4). Again in *Surja Kanta Bhattacharjya* v. *King-Emperor* (5), decided on the 28th November, 1919, this Court quashed a trial under the following circumstances:— S. H. was convicted by Court of Sessions on a charge under sections 408 and 477A, of the Indian Penal Code, in respect of an item of Rs. 2, when he could have been, but was not, tried on a similar charge for a further sum of Rs. 7 at the same trial. This Court, on appeal, set aside his conviction and directed that he should not be retried, meaning, on the charge in respect of Rs. 2. Thereafter, the prosecution wanted to proceed against S. H. in respect of the other sum of Rs. 7. This Court stopped that trial.

(1) (1905) 2 A. L. J. 673.
(2) (1922) I. L. R. 49 Calc. 924.
(3) (1902) 7 C. W. N. 493.
(4) (1900) 5 C. W. N. 72.
(5) Cr. Rev. 934 of 1919.

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I am of opinion that if the petitioner had moved this Court for stopping his second trial, he would have found no difficulty in getting an order in his favour. But, after the trial is over, it is not possible to hold on this ground alone that the conviction is illegal. The fact, however, remains that he did move the magistrate for the purpose but failed.

I shall, therefore, make the Rule absolute to this extent that it will be ordered that the conviction will be upheld but the sentence should be reduced to the minimum that I can think of, namely, a day's rigorous imprisonment, which he must have already served out.

SUHRAWARDY J. I entirely agree. As the law stands, it is difficult to hold that the conviction is illegal. If a person commits breach of trust of or misappropriates different sums of money, he commits so many offences. But it is not desirable that he should be tried as many times, when he could have been tried for all of them at one trial. As for the sentence which my learned brother proposes to pass it is usual in meting out sentence at the first trial to take into consideration the gross amount misappropriated.

Rule absolute. Sentence reduced.

A.C.R.C.