APPELLATE CRIMINAL.

Before Lort-Williams and S. K. Ghose JJ.

MEHER SHEIKH

v.

EMPEROR.*

1931

Mar. 9.

Charge—Conviction without charge, when proper—S. 237 of the Criminal Procedure Code, scope of—Doubt as to facts, if brings s. 237, Cr. P. C., into play—Offences under ss. 448 and 323, I. P. C., if minor to that under s. 395—Code of Criminal Procedure (Act V of 1898), ss. 236, 237, 537—Indian Penal Code (Act XLV of 1860), ss. 323, 395, 448.

Section 237 of the Code of Criminal Procedure only applies to cases which fall within section 236. Neither of the two sections applies to a case where the facts themselves are in doubt or where on the facts alleged the offence is not in doubt, but they apply only to a case where there is no doubt as to facts, but doubt arises as to the inferences to be deduced from them, making it doubtful which of several offences the facts which can be proved will constitute. The case of *Begu* v. *King-Emperor* (1) does not encourage any rule to the contrary.

Ganesh Krishna v. *Emperor* (2), *Akram Ali* v. *Emperor* (3), *Kali Charan Mukherjee* v. *Emperor* (4), *Bhowanath Singh* v. *Emperor* (5), *Sheoratni* v. *Emperor* (6), *Genu Manjhi* v. *Emperor* (7), *Hajari Sonar* v. *King-Emperor* (8), *Harun Rashid* v. *Emperor* (9), *Dibakar Das* v. *Saktidhar Kabiraj* (10), *Isu Sheikh* v. *King-Emperor* (11) and *Jnanadacharan Ghatak* v. *Emperor* (12) referred to.

The doubt as to the inference to be drawn may continue up to the judgment stage when the court shall pass a judgment in the alternative under section 367 of the Code of Criminal Procedure.

The true test is whether the facts charged give the accused notice of the offence for which he is going to be convicted though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. A case of no prejudice is met by section 537 of the Criminal Procedure Code.

Offences under sections 448 and 323 of the Indian Penal Code cannot be said to be minor offences necessarily involved in a charge under section 395.

*Criminal Appeal, No. 863 of 1930, against the order of B. B. Ray, Sessions Judge of Murshidabad, dated Sept. 9, 1930.

(1) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 191.
(2) (1911) 10 Ind. Cas. 168; 12 Cr. L. J. 224.
(3) (1913) 18 C. L. J. 574.
(4) (1913) I. L. R. 41 Calc. 537.
(5) (1917) 43 Ind. Cas. 618; 19 Cr. L. J. 202.
(6) (1919) 54 Ind. Cas. 252; 21 Cr. L. J. 44.
(7) (1914) 18 C. W. N. 1276.
(8) (1921) 26 C. W. N. 344.
(9) (1925) I. L. R. 53 Calc. 466.
(10) (1927) I. L. R. 54 Calc. 476.
(11) (1926) 31 C. W. N. 171.
(12) (1929) I. L. R. 57 Calc. 807.

1931

Meher Sheikh
v.
Emperor.

CRIMINAL APPEAL.

The material facts appear from the judgment of the Court.

Pareshlal Shome for the appellant.

The Deputy Legal Remembrancer, Khundkar, for the Crown.

GHOSE J. The three appellants in this case have been convicted under sections 448 and 323 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year under each section, running consecutively, in the case of each of the appellants.

The prosecution case is that, on the night of the 29th June, last year, there was a dacoity in the house of one Gobinda Mandal of Godda. Five of the dacoits went into the house and they were all recognised. Gobinda and his wife Pabitra were assaulted. The woman was pressed to state where her things were and one of the dacoits tried to snatch away an ornament from her waist, but this was not successful. Ultimately the dacoits ran away. The defence was that there was no such occurrence and the accused were being prosecuted on account of ill-feeling. The three appellants and two others were put upon their trial on a charge under section 395 of the Indian Penal Code. The learned Sessions Judge, in his charge to the jury, made certain references to sections 448 and 323 of the Indian Penal Code. The jury, by a majority of 4 to 1, returned a verdict of guilty as against the three appellants under sections 448 and 323 and, accordingly, they were convicted and sentenced as stated above.

It is contended for the appellants that, in the circumstances of this case, when they were charged under section 395 and not under sections 448 and 323 of the Indian Penal Code, their conviction under

1931

Meher Sheikh v. *Emperor.*

Ghose J.

the latter sections is bad in law. The learned Deputy Legal Remembrancer concedes that the offences under sections 448 and 323 cannot be said to be minor offences necessarily involved in the charge under section 395 and that, therefore, section 238 of the Code of Criminal Procedure would not apply. But he has strongly contended that section 237 of that Code applies, and that so the appellants were rightly convicted under sections 448 and 323, though they were not specifically so charged. Now section 237 of the Criminal Procedure Code only applies to a case to which section 236 can apply. The latter section, as also sections 234, 235 and 239, are exceptions to the general rule that there must be separate charges for distinct offences. Sections 237 and 238 provide for conviction without charge in certain cases. Section 235 provides that, where different facts of the same transaction constitute different offences, the accused may be charged with and tried at one trial for every such offence. Section 238 deals with a case where the same transaction involves a major and a minor offence, and it provides that where the accused was charged with the former only, he may be convicted of the latter. Section 236 on the other hand deals with a transaction which raises a doubt as to the offence that has been committed. There must not be any doubt as to "the single act or series "of acts" which constitute that transaction, that is to say, there must not be any doubt as to the facts. The doubt must be as to the inferences to be deduced from those facts, thus making it "doubtful which of "several offences the facts which can be proved will "constitute." In the case of *Ganesh Krishna* v. *Emperor* (1) it was stated, "The doubt referred to in "section 236 is generally described as a doubt of law. "This phrase is not strictly accurate, for it is a doubt "as to subsidiary facts which would determine what "law was applicable." In that case, it was pointed out that the expression "facts" used in the wide sense of section 3 of the Evidence Act would include the

(1) (1911) 10 Ind. Cas. 168; 12 Cr. L. J. 224.

intention or knowledge, and the result, which would constitute the elements of a specific offence. Thus when the doubt is as to one of several offences the accused may be charged with one of such offences. This is before evidence is gone into. But when evidence is gone into, and the doubt disappears, and it is found that the accused committed a different offence with which he might have been charged under section 236, then section 237 comes into play. Thus section 237 does not apply where the facts themselves are in doubt, or where on the facts alleged the offence is not in doubt: *Akram Ali* v. *Emperor* (1), *Kali Charan Mukherjee* v. *Emperor* (2), *Bhowanath Singh* v. *Emperor* (3), *Sheoratni* v. *Emperor* (4); the last two being cases of the Patna High Court. It may be that, even after evidence, the inference will be that the accused has committed one offence or another. For instance, the court may presume that a man, who is in possession of stolen goods soon after the theft and does not account for his possession, is either the thief or has received the goods knowing them to be stolen. In such a case, the doubt may be taken up to the judgment stage and the court shall pass judgment in the alternative under section 367 of the Criminal Procedure Code. But this is of no avail where the facts themselves are in doubt. Mr. Khundkar has relied on the decision of the Judicial Committee, in the case of *Begu* v. *King Emperor* (5). That case shows that section 237 must be read with section 236, and indeed no authority is required for that proposition, though it has been stated repeatedly. The true test is whether the facts are such as to give the accused notice of the offence for which he is going to be convicted, though he was not charged with it, so that he is not prejudiced by the mere absence of a specific charge. On this principle was decided cases like: *Genu Manjhi* v. *Emperor* (6),

(1) (1913) 18 C. L. J. 574.
(2) (1913) I. L. R. 41 Calc. 537.
(3) (1917) 43 Ind. Cas. 618; 19 Cr. L. J. 202.
(4) (1919) 54 Ind. Cas. 252; 21 Cr. L. J. 44.
(5) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 191.
(6) (1914) 18 C. W. N. 1276.

1931

Meher Sheikh v. *Emperor.*

Ghose J.

Hajari Sonar v. *King-Emperor* (1), *Harun Rashid* v. *Emperor* (2), *Dibakar Das* v. *Saktidhar Kabiraj* (3), *Isu Sheikh* v. *King-Emperor* (4) and *Jnanadacharan Ghatak* v. *Emperor* (5), and the aforesaid two cases of the Patna High Court. *Beğu's* case cannot be read as encouraging any rule to the contrary. On the other hand, a case of no prejudice is met by the provision in section 537 of the Code of Criminal Procedure. I do not think it necessary to examine certain other cases to which I have been referred, as most of them are not in point. Moreover, in the present case, the facts create no difficulty.

The first information in this case made out a clear case of dacoity or attempted dacoity. It is alleged that two persons held Pabitra and enquired if she had any ornament with her. The culprits are described as "thieves" and "dacoits.". No other motive was suggested. The informant definitely stated that all these men had come to commit dacoity in his cousin's house. In the course of his evidence, Gobinda, prosecution witness No. 2, made statements to the same effect. He stated that two of the accused had seized and dragged his wife, that Jharu Das tried much to take away the *bichâ* from her person, but that he could not succeed. Prosecution witness No. 3, Pabitra, also deposed to the same effect. She said that Meher asked her where her things were and told her to keep quiet, that Jharu Das tried to snatch away her *bichâ*, but that he could not take it.

In his charge to the jury, the learned judge, while stating the case for the prosecution, also mentioned that Pabitra was asked to state where her things were and Jharu tried to snatch the *bichâ* from her waist. On these alleged facts there was no doubt as to the nature of the offence committed; it was dacoity and that was also stated in the first

(1) (1921) 26 C. W. N. 344.
(2) (1925) I. L. R. 53 Calc. 466.
(3) (1927) I. L. R. 54 Calc. 476.
(4) (1926) 31 C. W. N. 171.
(5) (1929) I. L. R. 57 Calc. 807.

information. The learned judge after referring to the evidence proceeded as follows:

> Sections 379, 380, 390, 391, 392, 393 and 395 of the Indian Penal Code explained. There was no actual theft in this case. Theft is robbery if there is an element of violence in it. It is dacoity if there be 5 or more persons and if there is element of violence. If you believe that there was hurt, that 5 or more persons were concerned in the act and that their object was to cause wrongful loss to Gobinda and wrongful gain to themselves by taking away articles from the house of Gobinda then the accused who was concerned committed an offence under section 395, though no things were actually stolen. If you consider that the number was less than 5, then the offence would come under section 393.

So he clearly told the jury that, although there was no actual theft, still section 395 of the Indian Penal Code would apply; if the number was less than 5, then section 393 would apply. Then as to whether the prosecution case of attempted theft was true or not, the learned judge proceeded to comment on the evidence regarding the attempt to snatch the *bichâ* and the enquiry as to where things were kept. After that, the learned judge stated as follows:

> If the object was theft and if hurt was caused in the act then you should bring in a verdict under section 393, Indian Penal Code, or section 395 according to the number of persons who were involved in it. If the object was not theft, then you are to consider whether sections 448 and 323 of the Indian Penal Code are applicable. Sections 441, 442, 448 and 323 explained. You are to consider whether the culprits who entered the house at that hour of night went there with the object of committing an offence. If they did so, then they committed an offence under section 448. If they or such of them as caused hurt did so without any provocation, then they committed an offence under section 323. You have heard the evidence. You are to consider whether there is any provocation or not. You are to consider sections 448 and 323 only if you find that section 395 or 393 is not applicable.

Here the learned judge raised a doubt as to a question of fact, *viz.*, whether the culprits really asked where the valuables were kept and tried to seize the *bichâ*. If the jury did not believe that, then he suggested some other offence. As I said above, on the facts alleged, it was dacoity and nothing else. What the learned judge said here was not the prosecution case, there were no charges under sections 323 and 448 of the Indian Penal Code, and the accused had no notice of any such case. In these circumstances, section 237 of the Criminal Procedure

1931

Meher Sheikh
v.
Emperor.

Ghose J.

Code has no application. There was clearly a misdirection. If it was intended that, failing section 395, the accused might be convicted under sections 448 and 323 of the Indian Penal Code, then charges should have been framed under the latter sections. But in any case, if a material part of the prosecution story should be disbelieved it was for the serious consideration of the jury whether that story should be believed at all, and the jury should have been warned to that effect. There was further misdirection in that the learned judge did not put to the jury the case of each accused with reference to the offences under sections 448 and 323 of the Indian Penal Code separately.

The appeal must, therefore, be allowed and the conviction of the appellants set aside. The case must be retried according to law on suitable charges being framed.

LORT-WILLIAMS J. I agree. Section 237 applies only to cases which fall within the provisions of section 236.

Section 236 applies only to cases where, on the facts, proof of which is in the possession of the prosecution, it is clear beyond doubt, if the evidence be believed, that one or more of several offences, but doubtful in law which of them, has been committed. When the facts themselves are in doubt the sections do not apply.

Retrial ordered.

A. C. R. C.