APPELLATE CRIMINAL.

Before Lort-Williams and Jack JJ.

1935

Feb. 1, 7, 25.

ISTAHAR KHONDKAR

v.

EMPEROR.*

Charge—Doubt contemplated by section 236, Cr. P. C., what is—Presumption—Presumption of goods known to be obtained by dacoity, if can be raised—Code of Criminal Procedure (Act V of 1898), ss. 236, 237—Indian Evidence Act (1 of 1872), s. 114.

The doubt contemplated by sections 236 and 237 of the Code of Criminal Procedure must arise at the time of the charge. In order to decide whether such a doubt exists as will attract the provisions therein contained, the judge must know at that time what facts can be proved. Therefore, this expression must mean facts about which there is evidence in the hands of the prosecution. This matter cannot be affected by considerations whether the court or the jury will believe the evidence, if and when produced.

Where the evidence is circumstantial and the decision depends upon the question whether the court will draw a possible inference, or which of several possible inferences, there exists a doubt within the meaning of section 236 of the Code of Criminal Procedure.

Meher Sheikh v. *Emperor* (1) and *Tulsi Telini* v. *Emperor* (2) referred to.

Begu v. *King-Emperor* (3) dissented from.

The question whether the court will make one, or which of the, presumptions under section 114, illustration (*a*) of the Indian Evidence Act is irrelevant upon a consideration of the provisions of sections 236 and 237 of the Code of Criminal Procedure. The doubt there arises about whether the court will or will not presume a fact, and which fact, not about which offence the facts which can be proved will constitute within the meaning of sections 236 and 237.

When the accused are charged with dacoity under section 395 of the Indian Penal Code, and the facts proved, if believed, would constitute that offence, they cannot be convicted under section 412 of the Indian Penal Code with which they have not been charged, if the charge of dacoity fails.

Meher Sheikh v. *Emperor* (1) explained.

The direction of a judge to a jury upon section 114, illustration (*a*) of the Indian Evidence Act, should be in accordance with the statement of Lord Reading L. C. J. in the case of *Reg.* v. *Isaac Schama* (4).

*Criminal Appeal, No. 486 of 1934, against the order of M. M. Kripalani, Additional Sessions Judge of Bakarganj, dated May 5, 1934.

(1) (1931) I. L. R. 59 Calc. 8.
(2) (1923) I. L. R. 50 Calc. 564.
(3) (1925) I. L. R. 6 Lah. 226; L. R. 52 I. A. 191.
(4) (1914) 11 Cr. App. Rep. 45.

The provisions of section 114, illustration (*a*) of the Indian Evidence Act do not entitle the court to presume the knowledge of dacoity or dacoits which is required for a conviction under section 412 of the Indian Penal Code, but only to presume that a man in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen.

CRIMINAL APPEAL.

The material facts and arguments appear from the judgment.

Sateendranath Mukherji and *Priyanath Bhattacharjya* for the appellant, Umacharan Patikar.

Amiruddin Ahmad for the Crown.

Cur. adv. vult.

LORT-WILLIAMS J. In this case six men were charged with dacoity, namely, Istahar Khondkar, Maijuddi, Azahar Ali, Adam Ali, Sanatan Patikar, and Umacharan Patikar and one, Jaminikanta Nath, under section 412 of the Indian Penal Code. Two of them were acquitted, namely, Sanatan and Jamini; all the rest the jury found guilty of offences under section 412. These five have appealed from jail.

The learned judge appears to have directed the jury that if they thought that there was not sufficient evidence of dacoity, but that there was evidence that the accused dishonestly received or retained stolen property knowing it to have been transferred by the commission of dacoity or received from dacoits, they might find them guilty under section 412 of the Indian Penal Code, although no charge under this section had been made against any one of them, with the exception of Jamini.

Of the five accused who have appealed from jail, one, Umacharan Patikar, has been represented by Mr. Sateendranath Mukherji. The rest are unrepresented. The point raised by the learned advocate on behalf of Umacharan is that the jury were not entitled to convict him of an offence under section 412 of the Indian Penal Code, because no charge was made

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against him under that section. *Achpal* v. *Emperor* (1). This argument, of course, would apply to the rest of the appellants.

Mr. Amiruddin Ahmad, who appears for the Crown, has argued that what the jury did was permissible under the provisions of sections 236 and 237 of the Code of Criminal Procedure, that is to say, he has argued that this was a case in which the facts which could be proved, were not in dispute or doubt; what was in doubt was the kind of offence which those facts would constitute within the meaning of those sections. *Meher Sheikh* v. *Emperor* (2) and the cases therein discussed.

Now, the facts were that a dacoity was committed, that none of the dacoits was recognised, but that some of the stolen goods were found about five to six weeks afterwards, in the possession of each of the accused. There was some evidence to show that each of the accused had taken steps to conceal the stolen goods. Two made confessions which implicated in the dacoity all of the accused except Jamini. The learned advocate for the Crown has argued that this case comes within the ambit of section 236 of the Code of Criminal Procedure, because there was no doubt about the facts which could be proved, and the only doubt which arose was what offence would be constituted by those facts, that is to say, what inference would the jury draw from the facts, would they consider that they were sufficient proof of an offence under section 395 of the Indian Penal Code or of an offence under section 412.

He went further and suggested that though the facts were not in doubt, there was a doubt whether the jury would make one of the presumptions which they could make under section 114, illustration (*a*) of the Indian Evidence Act, and which of those presumptions. Thus he argued that in cases to which that illustration applies, though the facts may not be in doubt, yet there will always be a doubt whether the

(1) (1923) 26 Cr. L. J. 1361 ; 89 Ind. Cas. 449.

(2) (1931) I. L. R. 59 Calc. 8.

court will make such a presumption, and which presumption, the making of which is permissive and optional, and therefore sections 236 and 237 of the Code of Criminal Procedure apply to all such cases.

In my opinion, both these arguments are unsound. The facts which could be proved were that a dacoity had been committed by all the accused except Jamini, and that some of the stolen goods had been found, five to six weeks afterwards and partly concealed, in the possession of each of the accused. These facts could be proved by the confessions of Maijuddi and Azaharali, and the evidence about the finding of the stolen goods. Whether the jury would believe the confessions and the rest of the evidence or not was and is irrelevant upon the point whether sections 236 and 237 of the Code of Criminal Procedure were applicable or not. Such a doubt is not contemplated by the sections. There was no doubt about the admissibility of the confessions. They had been recorded in the prescribed form by a magistrate, were declared therein to have been made voluntarily, and *prima facie* would be admissible in evidence. There was no doubt about what offence the facts to which I have referred would constitute. They would constitute, against all except Jamini, the offence of dacoity.

Thus the evidence of dacoity was direct and not circumstantial, and if this evidence were believed by the jury to be true, the only possible inference which could be drawn from the proved facts would be that the accused, other than Jamini, were guilty of dacoity. The learned advocate for the Crown has failed to appreciate the distinction between the doubt whether the jury would believe the evidence, and the inferences which it was possible for them to draw, assuming that they did believe it.

The doubt contemplated by the sections must arise at the time of charge. In order to decide whether such a doubt exists as will attract the provisions therein contained, the judge must know at that time what facts "can be proved". Therefore, this expression

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must mean facts about which there is evidence in the hands of the prosecution. What this evidence amounts to is disclosed in the depositions taken by the committing magistrate, and in any additional evidence which may be in the hands of the prosecution, and of which notice has been given. This matter cannot be affected by considerations whether the prosecution will be able to produce this evidence at the trial, or whether the court or jury will believe it, if and when produced.

With great respect for the decision of their Lordships of the Judicial Committee in the case of *Begu* v. *King-Emperor* (1), I think that decision will require to be reconsidered by them upon some future occasion. The facts which could be proved in that case against each of the accused clearly constituted both the offence of murder and an offence under section 201 of the Indian Penal Code, and, in my opinion, no doubt arose within the meaning of section 236 of the Code of Criminal Procedure.

It is true that the illustration to section 237 of the Code of Criminal Procedure seems, at first sight, to support the different view which their Lordships adopted, but section 237 applies only to cases which fall within the provisions of section 236, and is controlled by it. And the illustration is not really inconsistent with the view which I have taken, because the decision in the case illustrated might depend upon which of several possible inferences would be drawn from the facts proved. Where the evidence is circumstantial, and the decision depends upon the question whether the court will draw a possible inference or which of several possible inferences, there exists a doubt within the meaning of section 236. *Meher Sheikh* v. *Emperor* (2).

The decision in *Tulsi Telini* v. *Emperor* (3) was a case in point. In that case, ornaments and money to the value of Rs. 18,000 were stolen from the room of the complainant. The accused occupied a room in the

(1) (1925) I. L. R. 6 Lah. 226 ; L. R. 52 I. A. 191. (2) (1931) I. L. R. 59 Calc. 8.
(3) (1923) I. L. R. 50 Calc. 564.

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same flat. She was charged with theft under section 380 of the Indian Penal Code and convicted of an offence under section 54A of the Calcutta Police Act, with which she had not been charged. The evidence showed that she had obtained possession of the key and padlock of the door which separated her room from the room of the complainant. The rest of the evidence was matter of suspicion only, namely, that the accused made large payments to her creditors on the day of the theft and on the two following days, and, later, pledged ornaments and attempted to change notes for Rs. 1,000 and gave a goldsmith a large quantity of broken ornaments to be melted down. The identity of neither ornaments nor money was established. From the evidence about the key and padlock, a possible inference was that the accused stole the property. If this inference were not drawn by the court, the whole of the evidence taken together, might afford reason to believe that they were stolen within the meaning of section 54A. And such was the decision, though I doubt whether such an inference was possible upon those facts, or could properly have been drawn.

The second argument of the learned advocate is still more unsound. The question whether the court will make one and which of the presumptions under section 114, illustration (*a*), of the Indian Evidence Act is irrelevant upon a consideration of the provisions of sections 236 and 237 of the Code of Criminal Procedure. Such a presumption is not one of the facts which "can be proved". On the contrary, it can arise only when some fact or facts cannot be proved. In appropriate circumstances, such facts, though they cannot be proved may be presumed. And in such a case there would be no doubt about which offence the facts which could be proved would constitute. Alone they would not constitute any offence. But if the court decided to presume the existence of other facts, then the proved facts and the presumed facts together would constitute an offence. The doubt, therefore, arises about whether the court will or will not presume

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a fact, and which fact, not about which offence the facts which can be proved will constitute within the meaning of sections 236 and 237.

Upon this point there is a paragraph in the report of the judgment in *Meher Sheikh* v. *Emperor* (1), to which I was a party, which seems to be inaccurate and misleading. Therein it is stated at page 11 that—

> 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.

The paragraph as reported seems to confuse inference with presumption, and to suggest that a doubt whether the court will make a presumption, or which presumption, may be such a doubt as is contemplated by section 236. I did not intend to, and do not subscribe to, any such proposition, as I have already stated.

The direction of the learned judge upon section 114, illustration (*a*) was neither correct nor complete. The direction should have been in accordance with the statement made by Lord Reading L.C.J., in the case of *Isaac Schama* (2), with which Bray, Avory, Lush and Atkin J.J. agreed. It was as follows:—

> Where the prisoner is charged with receiving recently stolen property when the prosecution has proved the possession by the prisoner, and that the goods had been recently stolen, the jury should be told that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the jury think that the explanation may reasonably be true, though, they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. That *onus* never changes, it always rests on the prosecution. That is the law, the court is not pronouncing new law, but is merely restating it, and it is hoped that this restatement may be of assistance to those who preside at the trial of such cases.

The result is that in my opinion the learned judge's direction upon both section 412 of the Indian Penal

(1) (1931) I. L. R. 59 Calc. 8. (2) (1914) 11 Cr. App. Rep. 45.

Code and section 114 of the Indian Evidence Act was contrary to law, and the verdict of the jury was erroneous owing to these misdirections.

Although the jury gave no specific verdict on the charge of dacoity, inferentially their verdict was one of acquittal upon that charge, and as there is no appeal against that verdict under section 417 of the Code of Criminal Procedure, the appellants cannot be tried again for that offence.

The provisions of section 114, illustration (*a*), of the Indian Evidence Act do not entitle the court to presume the knowledge of dacoity or dacoits which is required for a conviction under section 412 of the Indian Penal Code, and the only evidence of such knowledge is contained in the retracted confessions, which were rejected by the jury. The evidence, however, relating to the concealment of the stolen goods is sufficient to prove guilty knowledge, and the circumstances were such as to justify us in making the presumption that the appellants, other than Umacharan, received these goods knowing them to be stolen. The evidence against Umacharan, apart from one of the retracted confessions, is very slight, and in his case we allow the appeal, and set aside the conviction and sentence, and acquit him.

Instead of sending the cases of the other appellants back for re-trial, we alter the finding to one of conviction under section 411 of the Indian Penal Code, and in view of the fact that each of the appellants was in custody, for seven months prior to his conviction, we reduce the sentence upon each of them to one year's rigorous imprisonment.

JACK J. I agree.

The confusion which has arisen about the interpretation of section 236 of the Indian Penal Code is due to the way in which it is worded. What is really meant seems to be "If a single act or series of acts is

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"of such a nature that it is doubtful which of several "offences has been committed if the facts *as alleged by* "*the prosecution are established,* the accused may be "charged with the commission of all or any of such offences".

The facts which can be proved are only ascertained after the completion of the trial and, therefore, the charge cannot be made to depend on them. Moreover in the terms of the section the doubt must arise from the nature of the acts or series of acts, and the doubt would arise because of the inferences which must be drawn from those acts. In interpreting the illustration to section 237 of the Code of Criminal Procedure, it must be remembered that it only applies to the class of cases referred to in section 236, and, therefore, it, does not refer to cases in which it is merely doubtful which offence will be proved, and section 237 is no authority for holding that, in such cases, on a charge of one offence a man can be convicted of a different offence. With great respect to Lord Haldane it would appear difficult to reconcile section 236 of the Code of Criminal Procedure with his statement in the case referred to by my learned brother *Begu* v *King-Emperor* (1).

The illustration makes the meaning of the words plain. A man may be convicted of an offence though there has been no charge in respect of it if the evidence is such as to establish a charge that might have been made.

This interpretation would make the doubt depend merely on the nature of the evidence whereas, under section 236, the doubt must arise from the nature of the facts or the inferences which can be drawn from these facts. If the doubt only depended on the evidence, section 237 would apply to every case.

In the present case if the facts as alleged by the prosecution were established, the accused were clearly guilty of dacoity and not of dishonestly receiving property stolen in a dacoity; therefore they could not be convicted of the latter offence on a charge of dacoity.

(1) (1925) I. L. R. 6 Lah. 226 ; L. R. 52 I. A. 191.

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The accused ought to have been charged with dishonestly receiving stolen property in the alternative, but since they have not been prejudiced by failure to frame this charge, and since the verdict of the jury clearly shows that they were guilty of this offence, there is no need to send back the case for retrial.

The jury found them guilty under section 412 of the Indian Penal Code instead of section 411 because of the misdirection of the learned judge where he said:

> If the jury believe that there is not evidence to hold they committed dacoity but that they hold that they dishonestly received or retained stolen property knowing it to be such they may find them guilty under section 412, Indian Penal Code.

The stolen property was not found with the accused until six weeks after the dacoity, and apart from the discarded confessions there is no evidence that they knew it was stolen *in the dacoity*, a factor which was necessary to bring the offence under section 412 of the Indian Penal Code.

Order modified.

A. C. R. C.