APPELLATE CRIMINAL.

Before Lort-Williams and Jack JJ.

1935
Feb. 21.

SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL

v.

RAGHULAL BRAHMIN.*

Joint trial—Offences under sections 380 and 411, when can be tried jointly—Code of Criminal Procedure (Act V of 1898), s. 239—Indian Penal Code (Act XLV of 1860), ss. 380, 411.

The joint trial of accused persons depends on the position as it exists at the time of the charge and not on the result of the trial.

Under section 239, clauses (*a*) and (*c*), three persons jointly committing thefts on two different occasions within a period of 12 months can be tried at the same trial. Under clause (*e*) of section 239, the joint trial would also be legal if two of them were charged with theft under section 380 of the Indian Penal Code and one under section 411 for each of these occurrences.

Conviction under section 411 of the Indian Penal Code upon a charge under section 380, is legal in a case to which section 237 applies.

CRIMINAL APPEAL.

The accused in this case were put upon their trial on two charges under section 380 of the Indian Penal Code, for having committed thefts on two different occasions within one year, from railway trains. The case for the prosecution was that, on the 18th August, 1933, a suit-case belonging to a passenger by the No. 29 up train of the Assam-Bengal Railway between Mariani and Amguri Stations was stolen. On the 22nd August, a similar theft took place in No. 30 down train between the same stations. Early on the 23rd August, the officer-in-charge of the Mariani G. R. Police Station searched the house of the accused Raghulal Brahmin at village Nakachari, between Mariani and Amguri and recovered both the

*Government Appeal, No. 8 of 1934, against the order of J. N. Borooah, First Additional Sessions Judge of Assam Valley Districts, dated May 15, 1934, reversing the order of R. R. Khaund, First Class Magistrate at Jorhat, dated Dec. 21, 1933.

1935

Superintendent and Remembrancer of Legal Affairs, Bengal
v.
Raghulal Brahmin.

suit-cases from a loft in his shop room. The other two accused were present there. Evidence was adduced to show that all the three accused were seen boarding No. 29 up on the 17th August shortly before the theft and accused Dhanbir and Hanuman were seen alighting at Nakachari, Hanuman carrying the stolen suit-case and Dhanbir the tickets for both. On the 21st August, these three got up on No. 29 up train and Dhanbir and Hanuman were seen getting down from No. 30 down train which crossed No. 29 up on the way. Hanuman carried the stolen suit-case and Dhanbir carried the tickets. Soon afterwards, all three were found in Raghulal's house, when the search was made. The trial court convicted Hunuman and Dhanbir under section 380 of the Indian Penal Code and Raghulal under section 411. On appeal, the Sessions Judge of Assam Valley Districts set aside the convictions and sentences on the ground of misjoinder of charges and acquitted the accused. The Local Government thereupon preferred this appeal.

Anilchandra Ray Chaudhuri for the Crown. The learned judge on appeal committed two serious errors. Firstly, he supposed that two of the accused were charged under section 380 of the Indian Penal Code and the third under section 411 with regard to each of the thefts. As a matter of fact all three were charged under section 380 read with section 34 on two different counts. This was legal under section 239 of the Code of Criminal Procedure after the amendment of 1923. The amendment was specifically intended to make such joint trial legal. Even if the charges were framed as the learned judge supposed it to be, the joint trial would still be valid under that section. The second error of the learned judge was that he forgot that the legality of a joint trial was not dependent upon the result of the trial at all, it depended upon the allegations made. The prosecution case throughout was that these three accused committed both the thefts together and charges were framed on that basis. There were

1935

Superintendent and Remembrancer of Legal Affairs, Bengal v. *Raghulal Brahmin.*

enough materials to support such a case, in as much all were seen moving together and boarding the trains on the different occasions. If only two were seen to alight, they were again seen together soon afterwards. [Discussed evidence.] The trial was perfectly legal. If ultimately the magistrate convicted one under section 411, he was competent to do so under section 237 of the Code of Criminal Procedure. The order of acquittal was based on errors of law and should be set aside.

Jnananath Borah for the accused. The joint trial was illegal because the two thefts were not part of the same transactions. Sections 234 and 239 of the Code of Criminal Procedure cannot be read together. The judge found that two accused committed the thefts and one merely received the stolen properties. They could not be tried together. In any case, there should be a rehearing of the appeal on the merits.

LORT-WILLIAMS J. This is an appeal by the Superintendent and Remembrancer of Legal Affairs, Bengal, on behalf of the Government of Assam, against the order of the First Additional Sessions Judge of the Assam Valley Districts, dated the 15th May, 1934, setting aside the convictions of the respondents and the sentences passed thereupon, for offences under sections 380 and 411 of the Indian Penal Code. The Sessions Judge did not go into the merits of the case, but decided the appeal on a point of law. It is unnecessary, therefore, to go in detail into the facts. They are sufficiently stated in the appellate judgment.

The case arose out of two thefts in two running trains, No. 29 Up and No. 30 Down, of the Assam-Bengal Railway, on the nights of the 17th August and 22nd August, 1933, and concerning two passengers, the owners, respectively, of two suit-cases which were stolen from their compartments on the two nights mentioned. Both the suit-cases were found in the early morning of the 22nd August, in the house of the respondent Raghulal about a mile from Nakachari

1935

Superintendent and Remembrancer of Legal Affairs, Bengal
v.
Raghulal Brahmin.

Lort-Williams J.

railway station on the same line. At the time when they were found partly concealed in Raghulal's house, Dhanjir and Hanuman also were found in the house.

The magistrate originally framed charges under sections 411/109 and 411 of the Indian Penal Code. But, subsequently, he thought that the charges so framed were not very clear and might prejudice the accused. Therefore, in their presence, he framed two charges under section 380/34 of the Indian Penal Code and the accused were given an opportunity to have the witnesses recalled for cross-examination. He cancelled the previous charges under sections 411 and 411/109. At the end of the trial, he convicted Dhanjir and Hanuman under section 380, and the appellant Raghulal under section 411 of the Indian Penal Code and sentenced Dhanjir and Raghulal to six months' rigorous imprisonment and a fine of Rs. 50, in default, one month's rigorous imprisonment, on each count, and Hanuman to six months' rigorous imprisonment on each count.

It appears from the record of the judgment of the learned Sessions Judge that he thought that had the learned magistrate convicted all the appellants under section 380 "as they were originally charged under", the trial would have been in order. But that, as Raghulal was found not to have committed either of the thefts, but to have received the stolen property of the first theft on the 18th morning and the other stolen property on the 22nd morning, according to the magistrate's own finding, a joint trial offended against the mandatory provisions of clauses (*c*) and (*e*) of section 239 of the Code of Criminal Procedure. The offences could not be said to have been committed jointly by all the appellants. "Thus the joint trial "of two offences, one under section 380 and the other "under section 411, committed on two different dates "not jointly by all the appellants, is quite illegal". Now it appears from this record, if it be accurate, that the learned Sessions Judge thought that all the appellants had originally been charged under

1935

Superintendent and Remembrancer of Legal Affairs, Bengal
v.
Raghulal Brahmin.

Lort-Williams J.

section 380 and that this had subsequently been altered to some other charge. If this was his belief it was inaccurate, because, as I have pointed out, the accused were originally charged under section 411, and ultimately under section 380 instead of section 411.

The record seems to show that the learned Sessions Judge misread section 239 of the Criminal Procedure Code. There was, in this case, no joint trial of two offences, one under section 380 and the other under section 411, as stated by the learned judge. The only charges were under section 380, against all the accused, and in respect of each of the thefts.

It is to be observed that the provisions of section 239, clauses (*a*) and (*c*) refer to persons accused, that is to say, charged. The provisions are intended to deal, therefore, with the position as it exists at the time of charge, and not with the result of the trial. All these persons were accused of the same offence, namely, theft under section 380, committed in the course of the same transaction, namely, the first theft. They were also persons who were accused of more than one offence of the same kind committed by them jointly within the period of 12 months, that is to say, two thefts, one on the 17th and one on the 22nd August, each of them being committed by them jointly.

The real question, therefore, which arises upon this appeal, and the only question which requires consideration, is whether, in these circumstances, the learned magistrate was entitled to convict Raghulal of an offence under section 411 with which he had not been charged. In my opinion, that procedure is covered by section 237 of the Criminal Procedure Code. This was a case in which, though the facts which could be proved were not in doubt, there was a doubt about which offence these facts would constitute, that is to say, the decision rested largely upon which inference the magistrate would draw from the facts proved after he had heard the whole of the evidence

1935

Superintendent and Remembrancer of Legal Affairs, Bengal
v.
Raghulal Brahmin.

Lort-Williams J.

including the cross-examination and the arguments of the pleaders on both sides. Even if the magistrate had framed charges under section 380 against Dhanjir and Hanuman and under section 411 against Raghulal, in my opinion, these three persons could have been tried together upon those charges in respect of these two thefts under the provisions of section 239 (*e*).

The result is that the order of the learned Sessions Judge setting aside the convictions and sentences must be set aside, and the appeal sent back to him to be heard upon the merits. The respondents will remain on the same bail and will appear before the Sessions Judge when ordered by him to do so.

JACK J. I agree.

Appeal allowed. Case remanded.

A. C. R. C.