CRIMINAL REFERENCE.

Before Guha and Lethbridge JJ.

1937

Aug. 10, 19.

AKHIL BANDHU RAY

v.

EMPEROR.*

*Procedure—Splitting up of a case, if permissible—*De novo *trial, if can be ordered—Inherent power of Court, how to be exercised.*

If a Court finds, at the time of framing the charges, that a *prima facie* case has been made out against the accused but the joint trial of all of them would be illegal on account of misjoinder of charges, the Court has inherent power to split up the case directing a *de novo* trial of some of the accused and proceeding with the trial of others.

When, in the course of a trial, an occasion arises which demands interference, but for which the Code of Criminal Procedure does not specifically provide, the Court has inherent power to make such order as the ends of justice require. Such power should not be capriciously or arbitrarily exercised, but it is to be exercised *ex debito justitiae* to do real and substantial justice for which alone the Courts exist.

Budhu Lal v. *Chattu Gope* (1); *Pigot* v. *Ali Mahammad Mandal* (2) and *Rahim Sheikh* v. *Emperor* (3) referred to.

It should ordinarily be possible for a Magistrate to decide the question of joinder of charges after the case has been opened by the Public Prosecutor. He need not necessarily wait till the stage of framing charges before he makes up his mind whether a case should be split up.

Rash Behari Shaw v. *Emperor* (4) distinguished.

Superintendent and Remembrancer of Legal Affairs, Bengal v. *Raghulal Brahman* (5) referred to.

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The material facts of the case and arguments in the Rule appear sufficiently from the judgment.

*Criminal Reference, No. 74 of 1937, made by T. B. Jameson, Sessions Judge of Jalpaiguri, dated May 13, 1937, and Criminal Revision, No. 601 of 1937.

(1) (1916) I. L. R. 44 Cal. 816.
(2) (1920) I. L. R. 48 Cal. 522.
(3) (1923) I. L. R. 50 Cal. 872.
(4) (1936) 41 C. W. N. 225.
(5) (1935) I. L. R. 62 Cal. 946.

Narendra Kumar Basu, Suresh Chandra Talukdar, Jogesh Chandra Sinha, Jay Gopal Ghosh and *Sudhangsu Bhooshan Sen* for the accused.

Anil Chandra Ray Chaudhuri for the Crown.

Cur. adv. vult.

LETHBRIDGE J. This case comes before us on Reference by the learned Sessions Judge of Jalpaiguri, and also on a Rule, issued by this Court in Revision. The material facts are shortly as follows. On June 6, 1936, a shareholder of the Kohinoor Tea Co. of Jalpaiguri sent a complaint against the directors of the company to the Deputy Inspector-General, Criminal Intelligence Department, at Calcutta. The police investigated his allegations, and reported that nine persons, including the directors of the Kohinoor Tea Company, the Bengal Dooars Tea Company, the Arya Bank and the Northern Tea Company were members of a criminal conspiracy during the years 1930-35 to commit cheating and criminal breach of trust, and that, in pursuance of this conspiracy, they actually committed various such offences. The report goes on to enumerate specific offences under those sections in respect of money, committed during those years, and also one case of offences under ss. 380, 409 and 411 of the Indian Penal Code in respect of green tea, for which purpose forgery and falsification of accounts were also committed. The police, accordingly, submitted charge-sheet against these nine persons and the Local Government sanctioned their prosecution under s. 196A (*2*) of the Code of Criminal Procedure in respect of an offence under s. 120B of the Indian Penal Code read with ss. 380, 411, 409, 420, 468, 109, 477A of the Indian Penal Code and s. 282 of the Indian Companies Act. It may be mentioned here that the police report, after asserting in its first paragraph the existence of a conspiracy, does not go on to mention

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any facts which would indicate that all the alleged offences were committed in pursuance of one conspiracy and one only. The Public Prosecutor opened the case on February 8, 1937, and in his opening address, so the Magistrate says, "hinted at the formation of groups of accused, but made no attempt at "the grouping of evidence".

A month later, while the examination-in-chief of the prosecution witnesses was proceeding, all the accused filed petitions objecting to their joint trial. On these petitions, the Magistrate passed the following order :—

The legality of a joint trial depends on the allegation made and not on the result of the trial as held in many reported cases including the Electricity Theft Case. Until I have come to the stage of framing charges I cannot finally decide anything. The point will be discussed in the judgment if a charge of conspiracy is framed.

By the 10th April, the evidence of 55 prosecution witnesses had been recorded, and the Magistrate adjourned the case. On the 12th of April the following order was passed :—

Public Prosecutor not ready. I have gone through the evidence and find that in order to avoid probable prejudice to the accused persons by a misjoinder of charges it is desirable that the case should be split up into separate ones against groups of accused and separate trials held. The learned Public Prosecutor is accordingly requested to come prepared on April 19, 1937, with draft charges against each group of accused in the light of the above order.

On the 19th of April, draft charges were submitted by the Public Prosecutor and the following order was passed :—

Draft charges scrutinised. Akhil, Rabeendra, Ramdin, Ramananda, Praphulla, Dwijen and Nripendra will be tried in one group (hereafter called the money group for the sake of abbreviation), while Akhil, Praphulla, Maneendra and Ashu will be tried separately in another group (hereafter called the tea group for the sake of abbreviation). Charges framed against the money group. The result is that evidence will have to be taken *de novo* against the tea group, as all the evidence admissible against the money group will not be admissible against the tea group also. As no grouping of evidence was done previously, the *de novo* trial of the tea group cannot be avoided now.

On this, the four accused, who form the tea group, moved the Sessions Judge, who has made the present Reference, recommending that the order directing a *de novo* trial of those four persons be set aside, as not being warranted by any section of the Criminal Procedure Code. At the same time, on the petition of four members of the so called money group (No. 1 being common to both), this Court issued a Rule on the Deputy Commissioner of Jalpaiguri to show cause why the proceedings should not be quashed. We have heard the Rule and the Reference together, and dispose of both in this judgment.

The Rule, as I have said, was issued at the instance of four members of the money group, whose grievance is against the charges already framed against them. Petitioners Nos. 1, 2 and 3 are directors and petitioner No. 4 was employed as an inspector of the Kohinoor Tea Co. It is said that there has been misjoinder of charges, and that the charges are too numerous and embarrassing. It is necessary to see what are the charges that have been framed against them. There is, in the first place, one charge of conspiracy against all seven members of the group to commit criminal breach of trust and cheating. Then there are seven specific charges against No. 1, Akhil, all of acts of criminal breach of trust or cheating, said to have been committed in pursuance of the said conspiracy, during the said period of five years. The specific offences charged against No. 2, Ramdin, are the same as six out of the seven charged against No. 1. The specific offences charged against No. 3, Ramananda, are the same as those against No. 2. There are only two such charges against No. 4, Rabeendra, corresponding with the first and seventh against No. 1. Of the three accused in the money group, who have not joined in the petition for Revision, there are seven specific offences charged against Praphulla, the same as those against No. 1, Akhil. There are three against Dwijendra and one against Nripendra, each corresponding to specific charges

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against petitioner No. 1. Thus the charges relate to seven specific offences in all, all of them either cheating or breach of trust, and all are charged as committed in pursuance of the one conspiracy.

If this is the *prima facie* effect of the evidence, then there is no misjoinder. Whether there is really *prima facie* evidence of one conspiracy, and one only, is a question which can only be answered after an exhaustive analysis of all the evidence, oral and documentary, on the record, which is not only impossible for us to undertake, but is outside our province. The Public Prosecutor and the Magistrate are of opinion that that is the effect of the evidence, and charges have been framed accordingly. The prosecution have undertaken to prove that the offences charged were committed in pursuance of a single conspiracy, that is, in the course of a single transaction lasting for five years. The charges, therefore, are not contrary to law.

The question remains whether the charges are so numerous and embarrassing as to prejudice the petitioners in their defence. We are satisfied that they are not. The petitioners are represented by lawyers, and we see no reason why the number of charges, which is not very great, should be a source of embarrassment to them. It was further alleged that the trial has been vitiated by the admission of legally inadmissible evidence. No instances of this were given. It is also said that the learned Magistrate had no jurisdiction to frame charges on the "old materials" by which is presumably meant the evidence already on record. He clearly had such jurisdiction.

The Rule is accordingly discharged.

The learned Sessions Judge in his letter of Reference, recommends that the Magistrate's order for a *de novo* trial of the tea group be set aside. The first question that arises upon this is whether there was

any need to split the case up, whether, that is to say, there would have been misjoinder, if in addition to the charges framed against the money group, the charges proposed to be framed against the tea group (which unfortunately are not before us) were joined in the same trial. On this point, for the reason I have already indicated, it is impossible for us to form our own opinion. The Public Prosecutor and the Magistrate thought that there would be misjoinder. The Judge was evidently of the same opinion. We cannot do otherwise than accept this opinion.

That being the position, what course was open to the Magistrate? He had reached the stage contemplated by ss. 253 and 254 of the Code of Criminal Procedure and was faced with the alternative of either discharging the accused or framing charges against them. In his opinion there was a *prima facie* case against all nine accused of offences triable under Chap. XXI. He could not, thereupon, discharge any of them. He was required by s. 254 to frame charges against them, but if he did so, misjoinder would result.

In the opinion of the learned Sessions Judge the only way out of the *impasse* was to frame charges against all the accused and commit them all to the Court of Sessions, where the case could then be split up. This suggestion is supported neither by the accused nor by the Crown. The offences are triable either by the Court of Sessions or by a Magistrate of the first Class, and it cannot be said that the case is not of sufficient gravity to justify a commitment. The questions for decision are, however, complicated, the trial is likely to be long protracted, and we are satisfied that the Magistrate exercised a wise discretion in not committing the accused for trial.

That solution not being acceptable, the situation was one for which the Code makes no provision. The Magistrate must, according to s. 254, frame charges,

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but if he does, there must be misjoinder and his proceedings which may take months longer and cost large sums of money must eventually be set aside. Is he then compelled to frame illegal charges? Obviously this cannot be so. It has been held more than once by this Court that criminal Courts have an inherent power to make such orders as may be necessary for the ends of justice.

This inherent power, it was said in *Budhu Lal* v. *Chuttu Gope* (1)—

is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the legislature as indicated in statutory provisions.

This was quoted with approval by Mookerjee A. C. J. in the case of *Pigot* v. *Ali Mahammad Mandal* (2). Similarly in the case of *Rahim Sheikh* v. *Emperor* (3) Buckland J. said:—

So far as it deals with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive, and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference, and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require.

That case has this point in common with the case before us that if the order complained of had not been passed, the proceedings would have had to run their course to the end, though vitiated by a flaw which must result in their being set aside.

In this case what the learned Magistrate has done is to order a *de novo* trial of the tea group, four out of the nine accused who were before him. Section 229 of the Code provides that the Magistrate may direct a new trial after adding to or altering a charge. It is not, therefore, a procedure alien to the Code; it

(1) (1916) I. L. R. 44 Cal. 816, 828. (2) (1920) I. L. R. 48 Cal. 522.
(3) (1923) I. L. R. 50 Cal. 872, 875.

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is in harmony with the intentions of the legislature as indicated in its statutory provisions. Nor was it, in our opinion, to the prejudice of the accused, though they themselves say that it will cause them irreparable mischief, and the learned Judge thinks that it will prejudice them very seriously both in time and pocket. For what are the alternatives? Commitment to the Sessions, which he himself suggests, would thus affect all of them, not only the tea group. To quash the proceedings, which is the prayer of the accused, would leave it open to the Crown to take fresh proceedings against all of them. In fact any course will be expensive, but *de novo* trial of the tea group will be less expensive it seems to us than any other.

We hold, therefore, that, in the circumstances, the learned Magistrate acted rightly in the exercise of his inherent power in ordering a *de novo* trial, and that there is no reason to set aside his order.

The whole difficulty has arisen because the Magistrate refused to consider the question of the joinder of charges, though it was raised by the Public Prosecutor in his opening, until he had recorded all the prosecution evidence. He referred to the case of *Rash Behari Shaw* v. *Emperor* (1) commonly called the Electricity Theft Case, as authority for his action. In our opinion it is not so. The point for decision in that case was what must be looked to, to see whether there has been misjoinder. A number of decisions are quoted in which it was held that the accusations must be looked to, not the result of the case. The last was the case of *Superintendent and Remembrancer of Legal Affairs, Bengal* v. *Raghulal Brahman* (2) where Lort-Williams J. said :—

> 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

and the judgment continues—

> we must therefore look to this matter as it appeared to the learned Magistrate at the time when he framed the charges.

(1) (1936) 41 C. W. N. 225, 241. (2) (1935) I. L. R. 62 Cal. 946, 950.

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This is clearly what the learned Magistrate had in mind. Now, what is decided is this, that a Court of appeal or revision in dealing with a question of misjoinder must look to the position as it appeared when charges were framed. In deciding whether charges were rightly framed, you must look at the position as it appeared to the Magistrate, when he framed them. But it was not decided, and it does not follow, that a Magistrate must wait till the stage of framing charges before he makes up his mind whether to split a case up. Such a course is, as the present case forcibly demonstrates, most inconvenient, and it should ordinarily be possible for a Magistrate to decide the question of joinder after the case has been opened by the Public Prosecutor.

We reject the Reference for the reasons given.

GUHA J. I agree.

Rule discharged and Reference rejected.

A. C. R. C.