APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice.

MANAVALA CHETTY (ACCUSED), PETITIONER.

v.

EMPEROR, RESPONDENTS.*

1906
July 9, 11,
18.

Penal Code—Act XLV of 1860, ss. 478, 480—Offence of using false trademark — No acquisition of the trademark in the sense used in the English Act necessary under s. 478 of the Indian Penal Code—Criminal Procedure Code, Act V of 1898, ss. 227, 233, 234—Joinder of more than three offences in one trial illegal—Trial not validated by striking out charge to cure such defect after case closed, though before judgment.

A person selling soap not manufactured by P, in a box which bears the name of P as a soap manufacturer, uses a false trademark and is guilty of an offence under section 480 of the Indian Penal Code. It is not necessary to constitute an offence under section 478 that a trademark in the sense in which the word is used in the English Patents, Designs and Trademarks Acts should have been acquired; and the mark is none the less a false mark because it appeared on the box and not on the goods.

Under sections 233 and 234 of the Code of Criminal Procedure, a person cannot be charged with more than three offences at one trial; and the defect cannot be cured, after the accused had pleaded and the case had closed, by amending the charges so as to reduce it to three offences. Although the words in section 227 of the Code of Criminal Procedure are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment, the section does not warrant the striking out of a charge for the purpose of curing an illegality already committed, and after the mischief which the Legislature intended to guard against had been done.

Subrahmania Ayyar v. *King-Emperor*, (I.L.R., 25 Mad., 61), referred to and explained.

THE petitioner in this case was tried and convicted by the Chief Presidency Magistrate under section 482 of the Indian Penal Code for using a false trademark by selling soaps of German manufacture in boxes bearing the trademark of Messrs. A. & F. Pears & Co.

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* Criminal Revision Case No. 158 of 1906, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of W. E. Clarke, Esq., Presidency Magistrate at Egmore, Madras, in Calendar Case No. 38969 of 1905.

MANAVALA CHETTY v. EMPEROR.

The charge originally included more than three offences, but when this was brought to the notice of the Magistrate at the argument after the trial was closed, the charge was amended so as to include only three offences. The portion of the judgment of the Magistrate dealing with this point was as follows :—

"On the facts deposed to by the prosecution witnesses this Court charged accused with offences under sections 417, 420 and 482, Indian Penal Code. In the course of argument it was brought to the Court's notice that the charge was defective as it transgressed the provisions of section 234, Criminal Procedure Code, having included more than three alleged offences committed within the space of twelve months. On March 9 accordingly the Court altered the charge under the provisions of section 227, Criminal Procedure Code, by striking out the offence alleged on August 12, 1905. This course was objected to by Mr. Cowdell, counsel for accused, and the case of *Subrahmania Ayyar* v. *King-Emperor*(1) quoted in support of his contention but the objection was overruled, as in my opinion, the case quoted did not apply to the circumstances of the present action. My reasons for this ruling need not, I think, be more than very briefly stated and they amount to this. In *Subrahmania Ayyar* v. *King-Emperor*(1)—the trial was proceeded with on an indictment contravening the provisions of section 234, Criminal Procedure Code. Judgment was pronounced and sentence passed; on appeal the High Court of Madras treated the contravention of section 234 as mere irregularity under section 537, Criminal Procedure Code, and disposed of the case on other counts. This was held improper by the Privy Council. This Court, before argument, was closed and judgment pronounced, cured a defect in the charges which otherwise would have resulted in causing the very evil the Privy Council condemns. Section 227, Criminal Procedure Code, gives the Court power so to cure a defect at any time before judgment is pronounced."

Petitioner preferred this criminal revision petition.

Mr. *T. Richmond* and Mr. *A. S. Cowdell* for the petitioner.

The Crown Prosecutor (Mr. *John Adam*) in support of the conviction.

JUDGMENT.—The first point raised on behalf of the petitioner in this case was, assuming the prosecution evidence to be true, that

(1) I.L.R., 25 Mad., 61.

an offence under section 480 of the Indian Penal Code had not been made out. I am of opinion that if the petitioner sold to a customer soap which was not manufactured by Pears in a box upon which the name of Pears appeared as a maker of soap, he used a box with a mark thereon in a manner reasonably calculated to cause it to be believed that the soap contained in the box so marked was manufactured by Pears, and by so doing, he used a false trademark and was guilty of an offence under the section. The argument that it had not been shown that Pears had acquired a trademark, in the sense in which the word is used in the English Patents, Designs and Trademarks Acts, in the design which is printed on the box in which the soap was sold, is beside the point. Under section 478 of the Indian Penal Code, "Trademark" includes any trademark which is registered under the English Acts, but by the same section the term is expressly defined to mean a mark used for denoting that goods are the manufacture or the merchandise of a particular person. In my opinion the mark is none the less a false mark because it appeared upon the box in which the goods were sold and not upon the goods themselves.

The second point raised on behalf of the petitioner was that the conviction was bad inasmuch as the petitioner had been charged with more than three offences in contravention of sections 233 and 234 of the Code of Criminal Procedure. In connection with this point the facts appear to be as follows:—

The petitioner was charged with an offence alleged to have been committed on August 12, 1905, and with three other offences alleged to have been committed on August 13, August 17 and September 30 of the same year. He was charged with these offences and he pleaded not guilty to all the charges. Evidence was adduced on behalf of the prosecution and on behalf of the defence, and the case was closed. In the course of the argument of counsel after the close of the case the attention of the Court was drawn to the fact that the petitioner had been charged with more than three offences. Thereupon the Magistrate purporting to act under section 227 of the Code struck out the charge relating to the offence alleged to have been committed on August 12. The petitioner's counsel objected to this being done. The Magistrate states in paragraph 8 of his judgment that, except for the purpose of the defence, he does not propose to notice the

MANAVALA CHETTY v. EMPEROR.

evidence of the witnesses who spoke to the offence alleged to have been committed on August 12th. The Magistrate did not convict the petitioner of any specific offence with reference to the dates specified in the charge, but he convicted him, in general terms, of "an offence under section 482 of the Indian Penal Code."

I do not think it was open to the Magistrate at the stage of the proceedings when he struck out the charge to amend the charge so as to reduce the offences to three. Section 233, Criminal Procedure Code, lays down the general rule that for every distinct offence there must be a separate charge. Section 234 qualifies the general rule by providing that, in certain cases, an accused person may be charged with and tried at one trial for not more than three offences. If the prosecution seek to have the benefit of the exception which modifies the general rule, it is, of course, for them to show the case falls within the terms of the enactment which provides for the exception. In the present case the charge was not amended until after the petitioner had been charged with four offences, had pleaded to four offences and evidence had been adduced on both sides with reference to four offences. It may be that the words of section 227 are wide enough to warrant a Court in altering a charge by striking out one of the charges at any time before judgment; but it seems to me the section does not warrant the striking out of a charge for the purpose of curing an illegality which had already been committed. One of the objects of the limitation contained in section 234 is to prevent the accused being embarrassed by a multiplicity of charges. I am unable to hold that a charge which is bad on the face of it can be cured by an amendment made at a stage of the proceedings when the mischief which the Legislature intended to guard against by the enactment which has been contravened, may already have been done.

The learned Magistrate was of opinion that the observations of Lord Halsbury in delivering the judgment of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) did not apply to this case, since in this case the defect in the charge was cured before judgment was pronounced. It seems to me that Lord Halsbury's observations are applicable to the facts of this case.

With reference to the case of *Subrahmania Ayyar* v. *King-Emperor*(1), I may observe that the real point in that case was

(1) I.L.R., 25 Mad., 61.

not—as seems sometimes to be assumed whether the charging with and trying for more than three offences at one time could be regarded as an error, omission or irregularity within the meaning of section 537 but whether, under article 26 of the Letters Patent the Court had power to adopt the course which as taken in that case.

I am of opinion that the conviction in the present case was bad and must be set aside. I accordingly set it aside and order a new trial.