With regard to the shape of their Lordships' decree, it is to be noted that, consequent upon litigation with regard to this and other property, a receiver was appointed. This circumstance saves any complexity from arising in the carrying out of the present judgment. The receiver will act upon it. He will deliver possession of Repudi upon the terms of the contract now affirmed, that is to say, the plaintiff will be entitled to the village as from and after the Rani's death.

The judgment now given disposes of any necessity for a pronouncement upon the cross-appeal.

Their Lordships will humbly advise His Majesty that the appeal be allowed with costs, and that the cross-appeal be dismissed also with costs.

Appeal allowed; Cross-appeal dismissed.

Solicitor for the plaintiff (appellant in appeal and respondent in cross-appeal)—*Douglas Grant.*

Solicitor for third defendant (appellant in cross-appeal and a respondent in appeal)—*Edward Dalgado.*

Solicitors for the other respondent in appeal—*T. L. Wilson & Co.*

J.V.W.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield, Mr. Justice Seshagiri Ayyar and Mr. Justice Napier.

THE PUBLIC PROSECUTOR (APPELLANT),

v.

K. M. KADIRI KOYA HAJEE (ACCUSED).*

1915. April 21, 22, 23 26, 27 and 30.

29 M.L.J 101

Criminal Procedure Code (Act V of 1898), ss. 421, 233 and 537—Criminal appeal—Presentation of, to an officer of the Court, or to one of the Judges—Appellate Side Rules, r. 1 (1) (f)—Divisional Court for the disposal of criminal business—Powers of, to admit criminal appeals, when admission Court is sitting—Notes to the Weekly Sitting List—Charter Act (24 & 25 Vict., Cap. 104), ss. 13 and 14—Joint trial of two separate calendar cases—Offences, distinct—Illegality, not cured by section 537, Criminal Procedure Code—Retrial, if acquittal wrong.

When a case of acquittal taken up by the High Court in the exercise of its powers of revision was under the consideration of a Bench, notice was

* Criminal Appeal No. 159 of 1915.

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issued to the Public Prosecutor to appear at the further hearing of the revision and also to inform the Court whether Government intended to appeal against the acquittal. He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith. On that date an Admission Court constituted by a single Judge was sitting:

Held, that there was a valid presentation of the appeals.

The fact that a single Judge sitting in the Admission Court is entrusted with the duty of admitting criminal appeals does not deprive the Divisional Court constituted for the disposal of criminal business, of the right to exercise its power of admitting criminal appeals. It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not by reference to the notes to the 'Sittings List' which are merely instructions for the guidance of practitioners. Under section 13 of the Charter Act rules for the exercise of the High Court's appellate jurisdiction by one or more Judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by section 14 to determine which Judge shall sit alone and which in Divisional Courts.

Per OLDFIELD, J.—As regards presentation, no special method is enjoined in the Code of Criminal Procedure; and therefore the question is one of administrative convenience alone. So long as there is an actual presentation to an officer of the Court such as a Bench Clerk or to one of the Judges, its members, the presentation is not invalid.

Where, on the presentation of a single complaint against the accused containing all the allegations necessary for the establishment of two cases, those allegations being shortly that the accused had cheated the Bank of Madras in connexion with certain bills of exchange and also by a false representation contained in a document as to the amount of his assets, the Magistrate after recording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges, framed separate charges and also numbered them as different calendar cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges,

Held, that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of section 233, Criminal Procedure Code, and that the illegality could not be cured by section 537, Criminal Procedure Code.

Subrahmania Ayyar v. *King Emperor* (1902) I.L.R., 25 Mad., 61 (P.C.), followed.

Where in an appeal preferred to the High Court against the acquittal of an accused after an illegal trial, the Court is of opinion that the acquittal is wrong on the merits, the accused cannot be convicted and sentenced by the High Court; the only course open is to order that the accused be tried a second time.

Per NAPIER, J.—The decision of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) does not compel the Court to hold that in no case can a

(1) (1902) I.L.R., 25 Mad., 61 (P.C.).

misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537, Criminal Procedure Code.

THE PUBLIC PROSECUTOR v. KADIRI KOYA.

APPEAL under section 417 of the Code of Criminal Procedure, 1908, against the acquittal of Kadiri Koya Haji by V. P. Row, the Additional District Magistrate of Malabar, in Calendar Case No. 4 of 1914.

The facts of the case are clearly set out in the judgment of OLDFIELD, J.—[see paragraphs Nos. 1 and 4].

N. Grant, the *Acting Public Prosecutor*, for the Crown.

The Honourable Mr. *T. Richmond* and *A. Ramaswami Mudaliyar* for the accused.

OLDFIELD, J. OLDFIELD, J.—The accused has been acquitted in Calendar Case No. 4 of 1915 on a charge of an offence punishable under section 420, Indian Penal Code, by the Additional District Magistrate of Malabar. A learned Judge thought it necessary to take up the case in the exercise of this Court's powers of revision. Whilst it was under the consideration of a Bench, Government instructed the Public Prosecutor to file the appeals, which are before us against the acquittals in Calendar Case No. 4 and Calendar Case No. 5, a connected case. I deal at present with the former.

A preliminary objection to the hearing of both appeals has been made that they were not legally presented and that they cannot be proceeded with, because the provisions of section 421 of the Code of Criminal Procedure have not been complied with, inasmuch as the appeals were not duly presented to this Court and they were not perused and notice was not ordered by a judge empowered for those purposes. The facts are that the Bench above referred to issued notice to the Public Prosecutor to appear at the further hearing of the revision case and also to inform the Court whether Government intended to appeal. He appeared and then handed in the appeals by Government now under disposal to the learned Judges, who perused them and ordered notice forthwith.

As regards presentation no special method is enjoined in the Code of Criminal Procedure; and therefore the question is one of administrative convenience alone. So long as there is, as there was in this case, an actual presentation to an officer of the Court, such as a Bench Clerk or to one of the Judges its members, I am

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OLDFIELD, J.

not prepared to hold that the presentation was invalid. As to compliance with section 421, accused relies on the note published at part of the weekly sittings list: "Urgent Criminal Appellate Side motions will be heard by the Bench before which the criminal work of the week is posted (and must be moved at 11 a.m.), unless an Admission Court is sitting, in which case, if the motion can be heard by a single Judge, the application must be made before the Admission Court" and argues that, as an Admission Court constituted by a single Judge was sitting on 15 March 1915, the date on which orders were passed under section 421, that Court alone, and not the Bench of two Judges, was competent to peruse the appeals. It is a sufficient answer to this objection that under section 13, Charter Act rules for the exercise of the High Court's appellate jurisdiction by one or more judges or by Divisional Courts can be made only by such High Court, the powers of the Chief Justice being only those conferred by section 14 to determine which Judges shall sit alone and which in Divisional Courts. It is by reference to the rules so made that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained, not by reference to the notes to the sittings list, which are merely instructions for the guidance of practitioners and parties. The rules made by this Court are contained in the Appellate Side Rules; and under rule 1 (1) (*f*), applications for the admission of appeals from the judgment of any Criminal Court are ordinarily to be made before a single Judge. This does not in terms, and is not intended to, deprive the Divisional Court, constituted for the disposal of criminal business, of the right to exercise its powers in special cases, such as those before us, in which convenience and the acquaintance with the circumstances, which the two learned Judges concerned had, rendered their intervention specially advisable. This objection must therefore fail.

I turn next to an argument relating to the conduct of the proceedings in the lower Court, on which Mr. Richmond, who appeared for the accused has relied, as a comprehensive answer to the appeal, in so far as the substitution of a conviction for the acquittal is asked for, and not merely an order for a retrial. The relevant facts are that both Calendar Case No. 4 and Calendar Case No. 5 were instituted by the same complainant by the presentation of only one complaint, containing all the allegations

necessary to the establishment of both cases, those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation, contained in Exhibit K, as to the amount of his assets. The Magistrate in spite, Mr. Richmond alleges, of his remonstrances recorded the prosecution evidence tendered on behalf of the complainant continuously without discriminating between that which was relevant on each of these two charges, examining each witness once as to all he knew regarding both and questioning accused under section 342, Criminal Procedure Code, only once. He then, as his diary shows, "split" the case into Calender Cases Nos. 4 and 5 and proceeded to the further cross-examination of the prosecution witnesses, which accused had claimed under section 256 (1). It is not clear whether he bore in mind that he had two distinct cases to try during the cross-examination of first prosecution witness; for part of it is headed Calendar Case No. 5. But his attempt to do so, if he made one, was ineffective, since that part of the cross-examination is in fact relevant rather to Calendar Case No. 4. And in any case the attempt was abandoned almost immediately, no such distinction being made in the cross-examination of third prosecution witness, who deposed regarding both the bills and Exhibit K, or of other witnesses. Subsequently one written statement was filed by the accused under section 256 (2), and both cases were disposed of in one judgment. Mr. Richmond argues that this was one trial of separate charges of distinct offences, which offended against section 233; that the trial was therefore not a legal one; and that, before accused can be convicted by this or any Court, a legal trial must be held.

There is no doubt that the offences in question in the two cases were distinct, and it is not suggested that section 234, 235, 236 or 239 is applicable. It is also in my opinion the fact that, although two charges were framed, one trial only was held. For except in that respect the proceedings were, as pointed out above, in every way similar to those, which would have taken place in one trial. It has not been shown how section 233 is not in point; and accordingly the learned Public Prosecutor's efforts have been directed mainly towards establishing that there is in question only an irregularity, to which section 537 is applicable.

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OLDFIELD, J.

This contention requires close scrutiny because the effect of the leading case on the subject—*Subrahmania Ayyar* v. *King-Emperor* (1)—is to discountenance any liberal application of the section and because it is in terms inapplicable, as the Public Prosecutor would apply it here, to sustain the validity of a trial, attacked by the accused only incidentally and not to resist directly a claim to the reversal or alteration of a decision in reference, appeal or revision. And there is in any case the direct objection, which I state in words borrowed from the decision already referred to: "When the Code positively enacts that such a trial as that which has taken place here shall not be permitted," it cannot be said "that this contravention of the Code comes within the description of error, omission or irregularity." This principle was applied to facts resembling those now in question in essential respects in *Gobind Koeri* v. *Emperor*(2) and *Raman Behari Das* v. *Emperor*(3), the latter case being authority also for a strict construction of section 233. The only conclusion I can reach is that section 537 is inapplicable; and it is therefore useless to follow the Public Prosecutor in his contentions that no failure of justice has been occasioned by what occurred or that the accused did not raise his objection to it at a sufficiently early stage in the proceedings.

As accused has undergone no legal trial, he cannot be convicted and sentenced by us; and if we are to take action, the only course open to us is to order that he be tried a second time. It is no doubt true that in two respects the case is one, in which interference with a decision of acquittal could be justified. For it is one of public importance since the establishment of the charge would mean that accused profited largely by conduct subversive of the existing system of mercantile credit; and, though it is not in my opinion legitimate in one judgment to hold that accused has not been tried legally and to reach a conclusion that he is guilty, the full argument we heard on the merits demonstrated that the Magistrate dealt most inadequately with one question of fundamental importance and never came to close quarters with the evidence. On the other hand the charge deals with events in October 1910 and was made over

(1) (1902) I.L.R., 25 Mad., 61 (P.C.). (2) (1902) I.L.R., 29 Calc., 385.
(3) (1914) I.L.R., 41 Calc., 722.

three years later on the 15th May 1914. The explanation given for this delay is that accused's accounts and other documents, on which the prosecution largely depends were not accessible to the complainant Bank, until proceedings in another case against accused had ended in this Court in September 1912. But I am not satisfied that the subsequent interval is not excessive; and it is clear that after so long accused would labour under great disabilities. In the circumstances I do not think that the case is one for retrial. In my opinion therefore the appeal must be dismissed.

SESHAGIRI AYYAR, J.—I have come to the same conclusion. Mr. Richmond contended that the appeal is not properly before us. The facts he relies on for this contention are these. The Public Prosecutor presented the appeal petition to SPENCER and COUTTS TROTTER, JJ., in Court through the Bench Clerk on the 15th March 1915. On that date, Mr. Justice AYLING was sitting in the Admission Court. Consequently he argues it was not competent to the two learned Judges to receive the appeal.

Before dealing with the objection, a few further facts may be stated. Under the orders of a learned Judge of this Court, the records of the present case were called for by the High Court. It was numbered as Criminal Revision Case No. 782 of 1914. On the 4th March, the learned Judges who heard the case sent a notice to the Public Prosecutor calling upon him to inform the Court whether the Government was prepared to file an appeal against the acquittal, and whether he would make any further representation in the matter. The Revision Case was adjourned to the 15th March. On this latter date, the incident referred to by Mr. Richmond took place. It is conceded that SPENCER and COUTTS TROTTER, JJ., were constituted a Bench for hearing Criminal Cases on the day for which the appeal was presented.

Mr. Richmond's first objection is that there was no valid presentation of the appeal. I am unable to agree with him. Section 419 contemplates a presentation by the appellant or his pleader. The petition of appeal was handed over to the clerk present in Court by the Public Prosecutor. It has not been shown that the clerk had no authority to receive the appeal petition. Even if it be said that the presentation was to the Judges direct, I am unable to see why it is not a presentation to the High Court. Moreover, the learned Judges

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who heard the revision petition having issued the notice were certainly competent to receive the appeal which was presented to them in pursuance of that notice. There is no force in this contention.

The second argument rests on the fact that in the note appended to the sitting list for the week, it is stated that all applications relating to criminal matters should be made before the Judge sitting in the Admission Court. It is therefore argued that the presentation of the appeal for admission to the two learned Judges while there was an Admission Court was improper. Speaking for myself, I accept the contention of the learned Counsel that when the Public Prosecutor presented the appeal petition to the learned Judges he moved for its admission, Rule 1 of the Appellate Rules of Practice speaks of it as an application. I do not think that the admission of the appeal is a partial hearing of the appeal itself. I proceed on the assumption that when an appellant asks the Court to admit an appeal, he is making an application in a criminal matter. In this case, it was an urgent application, as the hearing of the Revision Petition which was stayed depended upon the admission of the appeal. The question then arises, whether the Criminal Bench was deprived of jurisdiction to admit the appeal because an Admission Court was sitting. The note in question only says that ordinarily all applications of this kind should be heard by the Admission Judge. Under clause 13 of the Charter Act, the High Court can make rules for the exercise, by one or more Judges, of the Original and Appellate Jurisdiction vested in the Court. Clause 14 empowers the Chief Justice to determine what Judge shall sit alone and what Judges shall constitute a Bench. It was under this clause the two learned Judges were constituted a Bench to hear and determine criminal cases. They had jurisdiction to dispose of all criminal matters during the week of their sitting. Their jurisdiction was not taken away, because a single Judge was entrusted with the duties of admitting appeals. Stress was laid on the foot-note to the sitting list to which I have already referred. I have no hesitation in saying that it was not intended to restrict the powers of the Benches constituted for the week. It was only an intimation to the practitioners as to the course they should adopt. It may be taken also as a suggestion to the Benches not to encourage

applications made to them otherwise than in accordance with the note. Every Judge of the High Court would certainly act on the suggestion. But there can be no warrant for arguing that this note deprives the Criminal Bench of its jurisdiction to hear applications. There is nothing in section 14 which would enable such a limitation being placed on the powers of a Bench. Clause 36 of the Letters Patent on which Mr. Richmond relies is not against this view. As pointed out in *Haladhar Maiti* v. *Choytonna Maiti*(1), the Chief Justice has power to constitute a Bench even in the absence of rules made under clause 13; and when a Bench is constituted, it has jurisdiction to hear applications and appeals in criminal cases. I agree in holding that the appeals were properly before us.

Mr. Richmond finally contended that even if we are satisfied that the judgment of the lower Court is wrong, we ought not to convict his client of the offences charged, as the trial was illegal in that it contravened the provisions of section 233 of the Code of Criminal Procedure. It is to be regretted that such an objection should be taken at this late stage.

Mr. Richmond states that he objected at the outset to evidence being let in without specifying the charges on which the accused is to be tried. Although there is authority for the position [see *In the matter of Govindu*(2)] that the letting in of evidence before framing a charge in respect of separate allegations is not obnoxious to section 233 of the Code of Criminal Procedure, I think that the procedure is not calculated to advance justice. In *Sriramulu* v. *Veerasalingam*(3) and in *Palaniandy Goundan* v. *Emperor*(4) it was laid down that a trial commences only after the charge is framed. It is no doubt true that as the accused pleads only to the charge his trial commences really after the charge. None the less, he is practically on his trial from the moment the prosecution starts the case. However that may be, in this case we are concerned only with what happened after the charge was read out. The Magistrate rightly enough framed separate charges and numbered the cases as Calendar Cases Nos. 4 and 5 of 1914. But when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two

(1) (1903) I.L.R., 30 Calc., 588. (2) (1903) I.L.R., 26 Mad., 592.
(3) (1914) 27 M.L.J., 589. (4) (1909) I.L.R., 32 Mad., 213.

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trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. I do not think the fact that he noted the further cross-examination of the first witness as in Calendar Case No. 5 is of any consequence, because that examination was not in reference to the charge framed in that case. Under these circumstances, there can be no doubt that the trial offends against the provisions of section 233.

It was argued by the learned Public Prosecutor that as the reading of the charge and the numbering of the cases were not improper, the further irregularity in not recording evidence separately did not vitiate the trials. The section says that each charge shall be tried separately and the failure to conform to it at any stage of the trial renders the proceeding illegal: see *Subrahmania Ayyar* v. *King-Emperor*(1), *Gobind Koeri* v. *Emperor*(2) and *Raman Behari Das* v. *Emperor*(3). In *Emperor* v. *Madan Mandal*(4), the learned Judges point out that if the mode of trial was wrong, the proceedings ought to be set aside.

Mr. Grant's more serious contention was that section 537 cured the defect. In the first place, the section has no application. The language of the first part of the section is against the conclusion which the Public Prosecutor asks us to adopt. In the second place clause (*a*) which speaks of error "in proceedings before or during trial" does not cover cases where the trial itself is defective. Consequently, the explanation which introduces the principle of acquiescence under certain circumstances has no application. Moreover as the Judicial Committee has held that a violation of a plain provision of law is not an irregularity, the section has no application to the present case. In *Moharuddi Malita* v. *Jadu Nath Mandul*(5), the error related to the framing of the charge which is distinctly dealt with in clause (*a*) of section 537. Further in that case, the trial was perfectly regular. I am therefore of opinion, that the joint trial of the two calendar cases is opposed to section 233 and that consequently the accused should not be convicted of the offences charged against him.

I feel little doubt on the records before us that the accused is guilty of at least two out of the three counts mentioned in the

(1) (1902) I.L.R., 25 Mad., 61 (P.C). (2) (1902) I.L.R., 29 Calc., 385.
(3) (1914) I.L.R., 41 Calc., 722. (4) (1914) I.L.R., 41 Calc., 662.
(5) (1906) 11 C.W.N., 54.

charge in Calendar Case No. 4. Ordinarily such a failure of justice would warrant a retrial of the accused. But the offence took place in October 1910 and the accused has been before the Criminal Courts on three occasions. Under these circumstances, I agree in holding that it is not desirable to direct a retrial.

NAPIER, J.

NAPIER, J.—I concur. I do not however think that the decision of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor*(1) compels us to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537 of the Code of Criminal Procedure. In the manner in which this case comes before us that section however cannot be relied on, and we have only to apply section 233. The only question that remains is what course we must adopt being satisfied (1) that the accused has been tried illegally, (2) that his acquittal on the merits on two of the charges was wrong and (3) that in the circumstances we do not think that he should be retried on those charges. It seems to me that we must do what the lower Court could have done if its attention had been drawn to the illegality of the trial before judgment, that is, acquit the accused, which in our position, is done by dismissing the appeal.

C.M.N.

APPELLATE CRIMINAL.

Before Mr. Justice Spencer and Mr. Justice Seshagiri Ayyar.

1915, February 8.

N. SUBBAYYA AND ANOTHER (COUNTER-PETITIONERS), APPELLANTS,

v.

P. RAMAYYA (PETITIONER), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), ss. 435, 439 and 133—Revision petition to the High Court against an order under section 133—Order of a single Judge of the High Court—Appeal against order, if maintainable—Letters Patent (24 & 25 Vict., cap. 104), cl. 15.

No appeal lies, under clause 15 of the Letters Patent, against an order of a single Judge of the High Court in a Criminal Revision Petition preferred against

(1) (1902) I.L.R., 25 Mad., 61 (P.C.).

* Letters Patent Appeal No. 373 of 1914.