APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

MANU MIYA *v.* THE EMPRESS.*

1882
October 9.

Joinder of charges—Offences of the same kind committed in respect of different persons—Criminal Procedure Code, (Act X of 1872), ss. 452, 453, and 455.

Where an accused was charged under one charge including four counts, *viz.*—

(1). House breaking by night with intent to commit theft in the house of *A*;

(2). Theft from the same house;

(3). House breaking by night with a like intent in the house of *B*;

(4). Theft from that house;

And where he pleaded guilty to the first and third charges,

Held, that the case was within the terms of s. 453, and that the words "offences of the same kind" are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house breaking.

Held, also, that the words "offences of the same kind" are not limited to offences against the same person.

Per FIELD, J.—The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section.

Per NORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf by separation of charges and for separate trials upon separate charges.

Empress v. *Murari* (1) dissented from.

THE facts of this case appear sufficiently from the judgment of Mr. Justice Norris.

No one appeared for either side.

The following judgments were delivered by the Court (FIELD and NORRIS, JJ.):—

NORRIS, J.—In this case there were four heads of charge or counts against the prisoner, *viz.*, *first*, house breaking by night

* Criminal Appeal No. 454 of 1882 against the order of H. Muspratt, Esq., Sessions Judge of Sylhet, dated the 21st June 1882.

(1) I. L. R., 4 All., 147.

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with intent to commit theft in the house of one Baroda Prosad Das; *second*, theft from the same house; *third*, house breaking by night with intent to commit theft in the house of one Tarini Churn Dutta; and, *fourth*, theft from the same house.

At the trial before the Sessions Judge the prisoner pleaded guilty to the first and third heads of charge, and was sentenced upon the first to three years rigorous imprisonment, and upon the third to three years rigorous imprisonment, to commence at the expiry of the sentence passed under the first head of charge.

It does not appear that any plea was recorded upon the second and fourth heads of charge; the Judge merely says: "No sentences are given under the second and fourth heads of charge as they are included in the first and third heads."

The Magistrate committed the prisoner upon one charge only, including therein the four heads of charge to which I have referred; and the Sessions Judge tried him upon that one charge as sent up by the Magistrate.

We do not think that the courses followed by the Magistrate and Sessions Judge are illegal. Section 452 of the Code of Criminal Procedure says: "There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." Section 453 says: "When a person is accused of more offences than one of the same kind, committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three." Then follows the explanation: "Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five." Section 455 says: "If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

Now if we are to hold that the words "offences of the same kind" in s. 453 refer to, and include only "offences that fall

within the provisions of s. 455," then undoubtedly there has been an illegality; there has been an "error or defect either in the charge or in the proceedings on the trial," which would call for our interference if we were of opinion that such error or defect had prejudiced the prisoner in his defence; but as the prisoner pleaded guilty, he cannot be said to have been thus prejudiced. But we are of opinion that we cannot so hold. To do so would be equivalent to striking s. 453 out of the Code altogether. We are of opinion that the words "offences of the same kind" in s. 453 are not to be limited by the explanation to that section, but include such a case as this where a man has within a year committed two offences of house breaking. The "offences" mentioned in s. 455 are not in fact "offences of the same kind," but offences of different kinds arising out of "a single act, or set of acts." Moreover, these offences of different kinds arising out of "a single act or set of acts" must, in the contemplation of the section, have been committed at one and the same time, whereas s. 453, by the use of the words "within one year of each other," clearly points to offences committed on distinct occasions, separated, it may be, by 364 days. Upon the words of the Act, therefore, we are of opinion that there has been no illegality.

We now proceed to consider another point, *viz.*, whether the "offences of the same kind," mentioned in s. 453, must be held to mean offences against one and the same person. We are of opinion that they must not be so limited. There is nothing in the words of the section itself so limiting them, and we are not at liberty to introduce words of limitation unless it is absolutely necessary to do so. We are aware that in this holding we are refusing to follow the decision of the High Court at Allahabad in the case of *Empress* v. *Murari* (1), but with the greatest respect for the learned Judges who decided that case, one of whom, Straight, J., has a most deservedly high reputation as a criminal lawyer, we do not think it is correct. As I said before there are no words in the section limiting its operation as the Allahabad High Court would limit it. This of itself would, in our opinion, be sufficient ground for supporting our present ruling; but

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we think it well to refer to the practice of the Criminal Courts in England as furnishing authority in support of our view. According to the Common Law of England, there is nothing to prevent a prisoner being charged on different counts of the same indictment on the several different felonies. In Hale's Pleas of the Crown, Vol. II, p. 173, it is laid down that "if there be one offender and several capital offences committed by him, they may be all contained in one indictment as burglary and larceny: larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment"; and see *Reg.* v. *Heywood* (1). In the case of *Castro* v. *The Queen* (2) Lord Blackburn, at p. 243, makes the following observation: "The course taken with regard to one indictment was this: The Queen having sent her Commission to the Grand Jury or any other Commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

"Now, at Common Law, there was no objection whatever, in point of law, to bringing a man who was charged with several offences if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and misdemeanour, and, therefore, felony and misdemeanour could not be tried together; but any number of felonies and any number of misdemeanours might. The con-

(1) 1 L. and C., 451.

(2) L. R., 6 App. Ca., 229.

trary was asserted by the learned Counsel, but though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made, to the discretion of the presiding Judge, to say, 'try me only for one offence, or try me only for two offences; if one was the real thing, let me be tried for one, and one only;' and whenever it was right that that should be done, the Judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now, and sanctioned by Statute—that is quite clear) that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the Judge ought, upon an application being made to him, to put the prosecutor to his election, and send them to two trials. It never was decided, even in felony, that if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanour, it was by no means a matter of course that that should be done. I think that if the Judge, upon an application made to him, had been satisfied that to try the man for several misdemeanours together would work injustice to the prisoner, he had a perfect right to say 'I will not work this injustice by trying them together, let us diminish them in number, and try a reasonable number and no more.'

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I do not know whether that was ever done in a case of misdemeanour, but I feel very little doubt that it may have been."

The Legislature has enacted in two cases that three charges of felony may be charged in one indictment. 24 & 25 Victoria, cap. 96, enacts that "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed, thereon, for all or any of them;" and s. 71 of the same Act contains similar provisions with regard to three distinct acts of embezzlement.

Such is the law and practice in England with regard to felonies. In cases of misdemeanour there is no limit to the number of counts charging distinct offences that may be inserted in one indictment. In prosecution of what are called "long firm swindles" it is not unusual to insert ten or fifteen counts, each charging a separate offence against different persons. Within my own experience there was a case tried before Mr Justice Hawkins at the last May Sessions of the Central Criminal Court, where the indictment contained some 120 counts, and at least 25 or 30 of these charged separate offences against different persons. The offences in this case, house breaking by night, or as called in England burglary, were, according to English law, felonies; and, no doubt, had the prisoner been tried in England, two separate indictments would have been preferred against him; but here, happily, we know nothing of the antiquated distinction between felony and misdemeanour, and, therefore, if our view of the law is correct, the question in this case is reduced to one of practice, and upon this point we are of opinion that the practice prevailing in England with regard to misdemeanour, is the one that should be followed here. But the Judges should take care that prisoners are not prejudiced by that course being taken, and they should, at all times, be anxious to lend a willing ear to any application for separation of charges and for separate trials upon separate charges. The prisoner in this case having been convicted on his own plea, there is no appeal under s. 273

of the Criminal Procedure Code, except as to the extent or legality of the sentence as I have already pointed out. We are of opinion that there is no illegality, and having regard to the offences to which he pleaded guilty, we are of opinion that the sentences are not at all too severe.

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This appeal will, therefore, be dismissed.

FIELD, J.—I am of the same opinion. I think that the explanation to s. 453 of the Code of Criminal Procedure must be understood as extending not as limiting the meaning of the section itself. As pointed out by my brother Norris, there are in the section no words which limit the three offences for which an accused person may be charged and tried at the same time to offences against the same person; and I think the explanation cannot operate to impose any such limitation or restriction upon the general language of the section.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

NOBIN CHUNDER ROY (ONE OF THE DEFENDANTS) v. RUP LALL DAS AND ANOTHER (PLAINTIFFS).*

1882. *July* 11.

Contribution, Suit for—Government Revenue—Payment by one co-sharer for another.

Where a co-sharer of a portion of a talook is compelled to pay a quota of the Government revenue due on account of a share, not his own, in order to save the portion of the talook from being sold, he is entitled to a charge upon such share for the money so paid, and such share should be charged even when it has passed subsequently into the hands of a third party.

Enayet Hossain v. *Muddun Monee Shahoon* (1), followed.

IN this suit the plaintiffs sought to have it declared that a sum of money paid by them in respect of Government revenue for a seven-anna share in a certain talook should be declared a charge

* Appeal from Appellate Decree No. 441 of 1881 against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th December 1880, modifying the decree of Baboo Doorga Churn Sen, Third Munsiff at Barisal, dated the 7th July 1880.

(1) 14 B. L. R., 155: S. C., 22 W. R., 411