erecting machinery must get the permission of the Commissioner (whether permission is equivalent to *licence* is a matter which we need not consider in this case) and the Commissioner may refuse permission if the machinery in his opinion constitutes a nuisance to the neighbourhood. The section is a very salutary one in the interests of the general public. We can therefore see no reason to interfere and we dismiss this appeal.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

SAMIULLAH SAHIB AND EIGHTEEN OTHERS (ACCUSED 1 TO 9 AND 11 TO 20), PETITIONERS*

1926, September 9.

v.

KING-EMPEROR.

Persons separately engaged in fishing in prohibited waters—No common object or common intention—Joint trial under ss. 379 and 447, Indian Penal Code—Same transaction—s. 239, Criminal Procedure Code—Applicability of.

Where a number of persons were all separately engaged in fishing, and were merely several poachers gathered in the same place at the same time, and there was no evidence of a common object or a common intention, and the said persons were tried together for offences under sections 379 and 447 of the Indian Penal Code as having been committed in the course of the same transaction, and convicted, *held*, that the accused ought not to have been tried together and that such joint trial was not a mere irregularity.

Whenever the applicability of section 239 of the Criminal Procedure Code is doubtful, it is far better that the accused should be tried separately. *Mala Makalakati Subbadu* v. *King-Emperor*, (1915) 28 M.L.J., 381, followed, *Emperor* v. *Rafuz-Zaman*

* Criminal Revision Case No. 33 of 1926.

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Khan, (1926) I.L.R., 48 All., 325, and *Choragudi Venkatadri* v. *Emperor* (1910) I.L.R., 33 Mad., 502, referred to.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Subdivisional Magistrate of Bandar in Calendar Case No. 9 of 1925.

V. L. Ethiraj and *K. Chathukutti Nambiar* for the petitioners.

Public Prosecutor for the Crown.

JUDGMENT.

The petitioners have been fined Rs. 15 under sections 379 and 447 of the Indian Penal Code for stealing fish in the course of the same transaction. They were all separately engaged in fishing and there is no evidence of common object or common intention, they were merely several poachers gathered in the same place at the same time. The question is whether under section 239 (*a*), Code of Criminal Procedure, they can lawfully be tried together.

The Subdivisional Magistrate has stated the difficulty in his third paragraph without solving it. Apparently the Prosecuting Inspector undertook to prove common intention but he has not done so. Even if ten people go separately and steal grain from a granary there must be a presumption of common intention before they can be tried together. The accused certainly cannot be held responsible for the wording of the charge sheet.

It cannot be said that these nineteen accused were not prejudiced by being tried together; nor had the Magistrate jurisdiction to try them. It is not a mere irregularity. See *Mala Makalakati Subbadu* v. *Emperor*(1),

(1) (1915) 28 M.L.J., 381.

which lays down the law more unequivocally than the head note to the report would suggest.

My attention has been directed by the Public Prosecutor to *Emperor* v. *Rafuz-Zaman Khan*(1) which traverses though not in terms the leading Madras case *Choragudi Venkatadri* v. *King Emperor*(2), where ABDUR RAHIM, J., has held that community of purpose is a necessary element if the transaction is to be regarded as the same. In the Allahabad case three persons gave three practically identical false statements describing how a man was killed. It was held that their joint trial was regular, because

> "the act of each accused may be wholly independent of the act of the other and in that sense there may be no community whatever; but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction."

And above, we prefer the phrase "identity of purpose" to the phrase "community of purpose." The latter phrase is ambiguous, in that it may mean only "identity of purpose" or it may suggest that the purpose of each was not only the same but was known to the others or in other words "conspiracy." We do not consider "conspiracy" in any way a necessary element. Therefore it is held to be sufficient for the purpose of section 239 if there has been identity of purpose exclusive of any idea of conspiracy; and the ruling might run, "there may still be identity of purpose and then the acts will be acts committed in the same transaction." There is no need to import the word "community" at all if it is only to mean identity.

The Public Prosecutor would argue from this that the present petitioners had an identical purpose, fishing

(1) (1926) I.L.R., 48 All., 325. (2) (1910) I.L.R., 33 Mad., 502.

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in prohibited waters, and therefore they may be tried together.

But this is to confuse identical with similar. The purpose of the fishermen was that each would catch fish; each was not interested in what others caught and the more remote consequence of their act, the wrongful loss to the owner, was no actual part of their purpose. But in the Allahabad case the purpose of the perjurers was to deceive the Judge; they were not severally composing fiction as if the perjury were an end in itself. With the fisherman the catch is the thing and not the consequence; with the perjurer the consequence and not the lie.

The terms of the section itself offer the best solution of these problems. Were the offences committed in the course of the same transaction; or, in other words, were the offenders putting through the same thing? *A*, *B* and *C* travel in the same train without tickets; the purpose of each is to be conveyed without paying; it is a similar purpose but not identical, because *A* does not intend that *B* and *C* shall escape paying and so with *B* or *C*. They cannot be jointly tried. *A*, *B* and *C* travel in compartments reserved for other communities, as a protest against the railway policy. There is no evidence that they have conspired, but if their purpose is to protest their purpose is identical. They are putting through the same thing and it is the same transaction. They can be tried jointly.

But this is not put forward as a general rule for solving the section. The only general rule is that whenever the applicability of section 239 is doubtful, it is far better that it should not be applied and that accused should be tried separately. It must be clearly understood that discussions with regard to particular circumstances neither add nor detract from the meaning

of the statute. As BENSON, J., observes in *Choragudi Venkatadri* v. *King-Emperor*(1) it is neither necessary nor advisable to attempt to define the expression "the same transaction" which the legislature has left undefined; but there is usually no great difficulty in deciding whether any particular case comes within the rule. In *Emperor* v. *Rafuz-Zaman Khan*(2) the same emphasis is laid upon the circumstances of the case, and the Court ends by finding as a matter of fact that there was conspiracy or prior consultation. Probably cases which can be tried together, although there has been no prior consultation, are rare. In the present case not only is there no evidence of prior consultation, but there is no identity of purpose, and the trial must be held to have been irregular. The accused are acquitted and the fines ordered to be refunded. There seems no necessity to order a retrial in such a petty matter, because the proceedings themselves have been deterrent and their acquittal does not affect the question whether petitioners have a right to fish in these waters.

B.C.S.

(1) (1910) I.L.R., 33 Mad., 502. (2) (1926) I.L.R., 48 All., 325.