

1926
 SWADESHI
 MILLS
 COMPANY,
 LIMITED,
 v.
 JUGGI LAL,
 KAMLAJAT
 COTTON
 MILLS
 COMPANY,
 LIMITED.

amount of damages, will be subject to their making good the deficiency in court fee, within thirty days of the office report declaring what amount is due from them. In case of failure to pay the court fee, the amount of damages, payable by the two defendants together, will be limited to the sum of Rs. 25,000 as claimed in the plaint. This amount will be payable by the defendant No. 1 and the defendant No. 2 in the proportion of 47 and 34. The defendants will pay the costs of this action which will include the costs of commissions, and, in this Court, counsel's fees; and interest is to be calculated on the damages at the rate of 6 per cent. as from the 1st of January, 1926, until payment.

Suit decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Pullan.

EMPEROR v. MAHABIR PRASAD.*

1926
 July. 12.

*Criminal Procedure Code, sections 423, 237 and 238—
 Charge of principal offence and conviction for abetment
 —Powers of appellate court to alter conviction.*

It is not open to a court to find a man guilty of abetment of an offence on a charge of the offence itself. The only section under which an appellate court can alter the finding and base a conviction for abetment is section 423 of the Code of Criminal Procedure. But this section must be read with sections 237 and 238 of the Code. Abetment not being a "minor offence," section 238 will not apply, and it can only come under section 237 if there is no element in the abetment which is not included in the charge.

* Criminal Revision No. 346 of 1926, from an order of J. Allsop, Sessions Judge of Aligarh, dated the 20th of May, 1926.

Reg. v. Chand Nur and Pirbhai Adamji (1), followed.
Yeditha Subbaya v. Emperor (2), referred to.

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THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Mr. *K. O. Carleton*, for the applicant.

The Assistant Government Advocate (*Dr. M. Wali-ullah*), for the Crown.

PULLAN, J. :—This is an application for revision of an order of the Sessions Judge of Aligarh convicting one Mahabir Prasad of the offence of abetment of burglary. Mahabir Prasad, who is a post office clerk, was charged along with another person with committing burglary at the Aligarh post office and stealing a sum of about Rs. 14,000. Both were found guilty by the Assistant Sessions Judge and Mahabir Prasad appealed to the Sessions Judge. The latter found that it was not proved that Mahabir Prasad took part in the burglary, but he convicted him of abetment of the offence. Put briefly, the view taken by the learned Sessions Judge is that Mahabir Prasad used his position in the post office to obtain the keys of the safe and strong room and had duplicates made which were used by the burglar or burglars to enter the office at night and remove this large sum of money.

It was laid down by the Bombay High Court, as far back as the year 1874, in the case of *Reg. v. Chand Nur and Pirbhai Adamji* (1), that it is not open to a court to find a man guilty of abetment of an offence on a charge of the offence itself. The only section under which the appellate court can base a conviction for abetment is section 423, Criminal Procedure Code. This section empowers an appellate court to alter the finding and maintain the sentence. But

(1) (1874) 11 Bom. H.C.R., 240. (2) (1912) 28 M.L.J., 722.

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this section must be read with sections 237 and 238 of the Code. Section 237 deals with a case where the offence has been wrongly described in the charge sheet and section 238 deals with a case where a court finds that the major offence of which the accused has been charged has not been brought home to him but a minor offence has been proved. Abetment is not a minor offence, and it can only come under section 237 if there is no element in the abetment which is not included in the charge. The learned Assistant Government Advocate attempts to support the order of the Sessions Judge in this case by referring to a ruling of the Madras High Court, *Yeditha Subbaya v. Emperor* (1), but this ruling does not in any way assist the case set up for the Crown; on the contrary, the judgement of the Bombay High Court, to which I have already referred, is carefully considered and followed by the Madras High Court in this very case. As the learned Judge observes—

“ Ordinarily, the facts required to prove the abetment should not be included in the facts constituting the principal offence . . .

The abetment, therefore, would be complete before the principal offence is committed. ”

The principle underlying these rulings is that no man should be convicted of an offence on a charge which he has not had an opportunity of answering. In the present case Mahabir Prasad was never charged with abetting the commission of this burglary by obtaining duplicate keys, and although the trial court went into this question in detail, it did so merely in order to use this circumstance as proof that the accused took part in the burglary; but now that the lower court has held that the accused did not take part in the burglary, the finding that he

(1) (1912) 23 M.L.J., 722.

abetted the offence before its commission by obtaining duplicate keys is contrary to law.

[His Lordship then considered, on the evidence, whether a re-trial should be ordered, and the judgment thus concluded :—]

I do not consider that on this evidence I should be justified in ordering a re-trial, for had the case come before me in appeal it is not improbable that the accused would have been acquitted. I, therefore, allow this application, set aside the conviction and sentence passed upon the accused and order that he be set at liberty. The fine, if paid, will be returned to him.

Application allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Sulaiman, Mr. Justice Daniels, Mr. Justice Mukerji and Mr. Justice King.

RAM REKHA SINGH AND OTHERS (PLAINTIFFS) *v.* GANGA PRASAD MUKARADDHWAJ AND OTHERS (DEFENDANTS).*

1926
July, 27.

Hindu law—Joint Hindu family—Mortgage—Previous mortgage renewed in favour of same mortgagee—Previous debt set off in subsequent deed—“Antecedent debt.”

Where a previous mortgage-deed of joint family property is renewed in favour of the same mortgagee and the consideration for the subsequent deed is the amount due on the earlier one, the alienation can be deemed to be in lieu of an “antecedent debt” so as to be binding on the sons, unless they can establish immorality or illegality.

* Second Appeal No. 116 of 1924, from a decree of H. Beatty, District Judge of Ghazipur, dated the 13th of October, 1923, confirming a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 28th of February, 1923.