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Magistrate at the re-trial to take a bond under section 106 if in his opinion the facts proved indicate the likelihood of a breach of the peace in the future on the part of the accused, of course provided that he has arrived at a conviction within section 106.

Accepting the reference I set aside the convictions and sentences and direct that the fines, if paid, be returned, and that the five accused persons be re-tried in the court of a competent Magistrate in a regular trial, not summarily, upon charges under sections 323 and 147 of the Indian Penal Code, and any other charges that may be disclosed by the evidence.

APPELLATE CRIMINAL.

Before Mr. Justice Dalal.

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January, 8.

EMPEROR *v.* JANESHAR DAS AND ANOTHER.*

Criminal Procedure Code, sections 233, 234, 236, 239—*Joinder of charges against several accused—Abetment as alternative charge counts as a distinct charge—Joint trial of two accused for three offences of the same kind, each accused being also charged in the alternative with having abetted the other—Prejudice.*

Two servants of a Government treasury were charged with three offences of criminal breach of trust, committed within the space of twelve months; each accused was also charged, in the alternative, with abetment of breach of trust committed by the other, in respect of each of the three items. They were tried jointly in one trial on all the charges. *Held* that when a man was charged in the alternative with embezzlement or abetment thereof he had to meet two distinct sets of circumstances, and each of the accused therefore was really tried for six offences. This was against the spirit of the provisions of section 233 of the Code of Criminal Procedure and was not covered by any of the exceptions detailed in the sections following it. The trial was illegal; and the question whether the accused were prejudiced or not did not arise.

* Criminal Appeal No. 749 of 1928, from an order of Pratap Singh, Additional Sessions Judge of Meerut, dated the 3rd of September, 1928.

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The provisions of section 236 could not be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge; it involved two separate charges.

Scope of section 239 discussed. *Ram Prasad* v. *King-Emperor* (1) and *Emperor* v. *Sheo Saran Lal* (2), referred to. *In re Bal Gangadhar Tilak* (3), distinguished.

THE facts of the case are fully set forth in the judgement of the Court.

Babu *Piari Lal Banerji*, Maulvi *Iqbal Ahmad* and Babu *Saila Nath Mukerji*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

DALAL, J. :—Janeshar Das and Khushi Ram, two servants of the treasurer of the Muzaffarnagar treasury, were charged with three offences and each offence was framed in the alternative, either of criminal breach of trust or abetment thereof. There was found a deficiency on a certain date in stamp labels kept in the double-lock of the treasury and in the cash kept in the single-lock. Inquiry was made and the prosecuting agency appears to have been doubtful whether Janeshar Das committed the breach of trust and Khushi Ram abetted him, or whether Khushi Ram committed the breach of trust and Janeshar Das abetted him. Three items of defalcation were chosen, two relating to stamps and one relating to cash, and as regards each item the charge was framed in the alternative. Both Janeshar Das and Khushi Ram were tried jointly. In this Court the argument of Janeshar Das has been that he was born a fool and the blackguard of the piece was Khushi Ram. On his behalf no allegation was made as to the illegality of the trial. This point, however, was stressed with great force by Mr. *Banerji* on behalf of Khushi Ram, as the learned counsel

(1) (1921) 19 A. L. J., 798. (2) (1910) I. L. R., 32 All., 219.
(3) (1908) I. L. R., 33 Bom., 221.

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appears to have felt that the cause of Khushi Ram was damaged by joint prosecution with Janeshar Das.

The provisions of section 239 of the Code of Criminal Procedure lay down how persons will be charged and tried together. Mr. *Banerji* argued that Khushi Ram was really charged for more than three offences, in fact six, as in each case he was charged in the alternative for breach of trust and for abetment thereof. This Court has held that the provisions of section 239 of the Code are to be considered exclusively, without the help of the provisions of sections 234 to 238. In 1921 in the case of *Ram Prasad* v. *King-Emperor* (1), KANHAIYA LAL and WALLACH, JJ., had before them the trial of more than one person for three offences of dacoity. They observed :—

"The four accused could also have been tried jointly in *one* trial for any one of the three dacoities in which they are alleged to have taken part, but all could not be tried together at one trial for the three dacoities, as these offences were not committed in the same transaction. Section 234 is one of a number of sections which are grouped together under the heading of 'joinder of charges.' This may, and in fact does, refer to charges both against a single and several accused. But the sections under the general heading relating to these respective cases are kept separate. Section 233 lays down a general rule that for every distinct offence there is to be a separate charge and that every such charge is to be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. Sections 234 to 238 by their terms refer to the case of a single accused. Section 239 deals with the case where more persons than one are accused. The legislature intended to and did by these sections differentiate between the cases of a single and several accused. It cannot be said that all the sections prior to section 239 apply to both these cases although in terms they refer to one only, viz., that of a single accused. The existence of a section (239) specifically dealing with the case of *several* accused, and the arrangement of the sections to which we have referred, constitutes such a repugnancy in the context as prevents us from reading 'a person' in section 234 as including several persons."

(1) (1921) 19 A. L. J., 796 (797).

These observations were made prior to 1923. The provisions of section 239 at that time were as follows :— "When more persons than one are accused of the same offence or of different offences committed in the same transaction, or when one person is accused of committing any offence and another of abetment of, or attempt to commit, such offence, they may be charged and tried together or separately, as the court thinks fit and the provisions contained in the former part of this Chapter shall apply to all such charges." The section was entirely recast by Act XVIII of 1923, and at present a joint trial is permitted of persons accused of more than one offence of the same kind, within the meaning of section 234, committed by them jointly within the period of twelve months. Obviously, therefore, when more persons than one are tried jointly reference cannot be made to provisions of the Code previous to section 239 indiscriminately. If that had been the intention it would not have been necessary to state definitely that persons accused of more than one offence of the same kind, within the meaning of section 234, committed by them jointly within the period of twelve months may be tried together. It is important to remember this, because the learned Government Pleader referred the Court to the words at the end of the section "and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges." Those words existed when the Bench ruling in the case of *Ram Prasad* was pronounced and the learned Judges refused to read the provisions of section 234 conjointly with the provisions of section 239. In my opinion the words at the end of the section are more by way of limitation than extension. The serious question that arises is whether the appellants should be considered to have been prosecuted on six charges, or on three alternative

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charges, each alternative case forming one charge. Mr. *Banerji*, in my opinion, rightly pointed out in this connection that if the legislature considered an offence and an abetment thereof in the alternative to be one charge there was no necessity to preserve clause (*b*) of section 239 when that section was recast in 1923. That clause permits the joint trial of persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence. If an offence and the abetment thereof were considered to be the same offence the case would have been covered by clause (*a*) without any specification in clause (*b*). The argument on behalf of the Crown was that the provisions of section 236 should be read along with the provisions of section 239. Under section 236 if a single act or series 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 may be charged with having committed all or any of such offences, and any number of such charges may be tried at once. At present I am not called upon to give an opinion whether this provision and the provisions of section 234 as to trial of accused persons for three offences committed within the space of twelve months are exclusive or not. The question is whether the provisions of section 236 may be utilized to declare the charge in the alternative of embezzlement and abetment thereof to be one charge. The provisions of section 236 themselves do not designate these separate charges as one charge, but designate them as different charges in the alternative, and that is why special permission is given under the Act for the trial of such charges. The Bombay High Court, in *In re Bal Gangadhar Tilak* (1), was of opinion that sections 234, 235, 236, and 239 were not mutually exclusive. It may be respectfully submitted that there was only one person up for trial in that

(1) (1903) I. L. R., 33 Bom., 221.

case, and the consideration of the provisions of section 239 did not arise in that case. We have also seen how a Bench of equal authority of this Court held several years later that the provisions of section 239 were exclusive. A single Judge of this Court in 1910, in *Emperor* v. *Sheo Saran Lal* (1), was not prepared to follow the reasoning of the Bombay High Court in the case of *Bal Gangadhar Tilak*. In that case an attempt was made to combine the provisions of section 234 and of section 235(1). It was argued there that if an accused person goes through three similar transactions within the period of twelve months, committing in each transaction the same series of offences, he can be tried at one and the same trial on account of all offences committed in the course of the three transactions, even if they total more than three. The learned Judge refused to extend the exception mentioned in section 234 by adding to it the exception mentioned in section 235(1). So far as this Court is concerned, the opinion has been that the provisions of sections 234, 235 and 236 are mutually exclusive. There is all the more reason, therefore, to hold that the provisions of section 239 stand by themselves and the scope thereof cannot be extended by use of the provisions of sections not referred to in section 239. In my opinion there is considerable reason in this view. When a man is charged in the alternative with embezzlement or abetment thereof he has to meet two distinct sets of circumstances. When in three separate cases he is charged in the alternative he has to meet six distinct sets of circumstances. This would be against the spirit of the provisions of section 233 and would not be covered by any of the exceptions detailed in the sections that follow section 233. In my opinion Khushi Ram was really tried for six offences. The trial was illegal, and the question whether Khushi

(1) (1910) I. L. R., 32 All., 219.

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Ram was prejudiced or not does not arise. At the same time it is possible that he was prejudiced in so far that Janeshar Das has attempted to throw the entire blame on him. Prejudice must also be presumed from the confusion arising from a man being called upon to face at a single trial six sets of circumstances.

In the result I set aside the convictions and sentences and order a re-trial of Janeshar Das and Khushi Ram. It will be for the prosecution to decide whether they should be tried jointly or separately. Possibly a separate trial would be more advisable, and the point should also be kept in view that so far as this Court is concerned the provisions of sections 234, 235, and 236 are considered to be mutually exclusive.

A request was made on behalf of Khushi Ram that the same learned Judge who convicted him may not hold the fresh trial. This is a reasonable request. The Sessions Judge of Meerut is requested to see that the trial is held by some other Sessions Judge.

FULL BENCH.

Before Mr. Justice Dalal, Mr. Justice Sen and Mr. Justice King.

1929. *January*, 7.

ANWAR KHAN (PETITIONER) *v.* MUHAMMAD KHAN AND OTHERS (OPPOSITE PARTIES).*

Act No. V of 1920 (*Provincial Insolvency Act*), *sections* 4, 53 —*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 53—*Jurisdiction—Insolvency court—Fraudulent transfer made more than two years before order of adjudication—Receiver questioning such transfer—Forum of trial.*

A receiver in insolvency having attached a house as the property of the insolvent, a stranger to the insolvency proceed-

* Second Appeal No. 4 of 1928, from an order of E. Bennet, District Judge of Agra, dated the 29th of October, 1927.