

*Before Justice Sir Barjor Jamshedji Dalal.*

EMPEROR *v.* BRIJIWAN DAS.\*

*Criminal Procedure Code, sections 222(2), 233, 235 and 403*

1930  
November,  
17.

—Conviction for embezzlement of a gross sum of money between two specified dates—Fresh complaint in respect of another sum embezzled during the same period but not included in the first trial—Second trial maintainable—Criminal Procedure Code, section 439—High Court's power to prevent a second trial—Discretion of court.

A person convicted of embezzlement of a gross sum of money between two specified dates can subsequently be tried on a fresh complaint in respect of the embezzlement of three specific sums of money during the same period, which were not included in the gross sum in the previous trial.

The charge of a gross sum embezzled between two dates is only one charge, and there may be a separate trial under the provisions of section 233 of embezzlement of another item not included in the gross sum for which an earlier charge was framed under section 222(2). No doubt two out of the three items in the present trial could have been tried jointly with the former offence for embezzling a gross sum, but there is no reason why there could not be a separate trial, because section 235 is only permissive and permits the trial of three offences of the same kind within a year by one trial but does not bar three separate trials for those offences.

The High Court can exercise its power under section 439 of the Criminal Procedure Code and prevent a second trial, for the ends of justice. Whether it will do so depends on the circumstances. The High Court refused to exercise its discretion to stop the second trial where the sentence awarded at the first trial was too light.

Mr. Kumuda Prasad, for the applicant.

The Assistant Government Advocate (Dr. M. Waliullah), for the Crown.

DALAL, J. :—Brijivan Das was a treasurer of a zamindar of Benares and was convicted in 1929 of an offence under section 408 of the Indian Penal Code of embezzlement with respect to a sum of Rs. 446-8-3,

\* Criminal Revision No. 590 of 1930, from an order of Chatur Behari Lal, Additional Sessions Judge of Benares, dated the 8th of July, 1930.

1930

EMPEROR  
v.  
BRIJIWAN  
DAS.

received by him in his capacity of servant of Babu Shiva Prasad Gupta and misappropriated by him between the dates 1st of February, 1928 and the 26th of September, 1928. He was sentenced to a day's imprisonment and a fine of Rs. 600. In the month of December, last year, the applicant's master through another servant instituted a fresh complaint for the prosecution of Brijivan Das on three charges of embezzling three sums of money on the 21st of June, 2nd of August and the 21st of August, 1928. It will be noticed that these dates fell within the dates of the previous charge, 1st of February and the 26th of September, but I have satisfied myself that these three items were not included in the gross sum for which the applicant was prosecuted, charged and convicted at the former trial. There is a certain divergence of judicial opinion as to whether, after a trial in respect of a gross sum for which a breach of trust was alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on intermediate days but not included in the gross sum is permissible or not. Dr. *Wali-ullah* has placed before me the case law on the subject with great clearness. In *Re Appadurai Ayyar* (1) the Madras High Court held that under such circumstances the charge in the first trial must be taken to have included all the items embezzled during the period entered in the charge. In *Nagendra Nath Bose v. Emperor* (2) there was a difference of opinion between three learned Judges. The view of one of them was in conformity with the view taken by the Madras High Court. The majority of the Judges took a view contrary to that of the Madras High Court, and following the view of the Bombay High Court in *Emperor v. Kashinath Bogaji Sali* (3). Looking at the provisions of section 403 of the Code of Criminal Procedure, there is nothing in those provisions to bar a trial on the present complaint.

(1) (1915) 32 Indian Cases, 158  
(160).

(2) (1923) I.L.R., 50 Cal., 632.

(3) (1910) 12 Bom. L.R., 226.

1930

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 EMPEROR  
 v.  
 BRLIWAN  
 DAS.

The first three sub-sections deal with offences falling within sections 236, 237 and 235(1) of the Code and do not deal with separate and distinct offences. The provisions of section 233 of a separate trial of every offence are in no way modified by the new provisions of section 222(2). The provisions of section 222(2) are enabling and enable a court to have a joint trial of what may apparently be several offences of breach of trust. The charge of a gross sum embezzled between two dates is only one charge and there may be a separate trial under the provisions of section 233 of embezzlement of another item not included in the gross sum for which an earlier charge was framed under section 222(2). It cannot be denied that two of the present offences could have been tried jointly with the former offence for embezzling a gross sum, and there is no reason why there could not be a separate trial, because section 235 is only permissive and permits the trial of three offences of the same kind within a year by one trial but does not bar three separate trials for those offences.

In certain cases the High Court can exercise its power under section 439 of the Code of Criminal Procedure and prevent a second trial for the ends of justice. Such a view was taken in the case of *Sidh Nath Awasthi v. The Emperor* (1) on the analogy of a case of this Court, *Inam-ulla v. King-Emperor* (2). This Court in 1916 exercised its revisional jurisdiction in countermanding a trial in the case of *T. N. Chadha v. Emperor* (3). In the present case I am not prepared to exercise that power. At the former trial the applicant was sentenced only to a day's imprisonment and fine. If he is really guilty of the embezzlement as alleged by his master he certainly deserves a heavier sentence. I dismiss this application.

(1) (1929) 83 C.W.N., 454.

(2) (1905) 2 A.L.J., 673.

(3) (1916) 14 A.L.J., 351.