Before Mr. Justice King.

EMPEROR *v.* SHIB CHARAN.*

1930
October, 16.

Criminal Procedure Code, sections 235 and 236—Not mutually exclusive—Accused charged with theft and kidnapping, being parts of same transaction—Conviction altered in appeal from theft to receiving stolen property—Criminal Procedure Code, sections 535 and 537—Interpretation of statutes.

An accused person was alleged to have (1) instigated a boy to commit theft of his father's money, (2) dishonestly received the stolen property from the boy and (3) kidnapped the boy from lawful guardianship. These acts formed a series and were so connected together as to constitute the same transaction. He was charged with and convicted of offences under sections 363 and 379 of the Indian Penal Code. In appeal the Sessions Judge set aside the conviction under section 363, as he was doubtful about the age of the boy, and altered the conviction under section 379 to one under section 411, as there was no proof that the accused himself committed the theft. In revision it was contended that the Sessions Judge had no jurisdiction to alter the conviction in this case.

Held that under the provisions of section 235(1) of the Criminal Procedure Code the accused could and should have been charged with, and tried at one trial for, offences under sections 379/109, 411 and 363 of the Indian Penal Code. The provisions of section 235(1) could be supplemented by those of section 236 of the Criminal Procedure Code, with the result that the accused could be charged with and tried for offences under sections 379, 379/109, 411 and 363 of the Indian Penal Code. It followed that under section 237 of the Criminal Procedure Code the appellate court was justified in convicting the accused under section 411 of the Indian Penal Code, although he had not been expressly charged with that offence.

There is no reason why sections 235 and 236 of the Criminal Procedure Code should be regarded as being mutually exclusive so that whenever a person is tried for two or more offences committed in the course of the same transaction, section 236 must be deemed to have been expunged from the Code.

*Criminal Revision No. 546 of 1930, from an order of H. G. Smith, Sessions Judge of Meerut, dated the 19th of June, 1930.

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It is a general rule of interpretation that effect must be given to every part of a statute.

Further, even leaving section 236 of the Criminal Procedure Code out of account, the trial court was clearly empowered to frame a charge under section 411 of the Indian Penal Code in addition to the charge of theft, by reason of the provisions of section 235(1) of the Criminal Procedure Code; and under sections 535 and 537 of that Code the mere omission to frame a charge did not authorise the setting aside of the conviction and sentence unless there was a consequent failure of justice, and in the present case there was no such failure of justice.

Mr. *K. D. Malaviya*, for the applicant.

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

KING, J.:—This is an application in revision against an appellate order of the learned Sessions Judge of Meerut convicting the applicant under section 411 of the Indian Penal Code.

The accused was charged in the trial court with kidnapping a boy from the lawful guardianship of his father, and with having stolen a hundred rupee note, under sections 363 and 379 of the Indian Penal Code. The trial Magistrate convicted the accused under both sections.

In appeal the learned Sessions Judge set aside the conviction under section 363 on the ground that it was at least doubtful whether the boy, whom the accused had taken away, was under the age of fourteen years on the date of the alleged offence.

With reference to the conviction under section 379 the Judge found that the evidence did not prove that the accused himself committed the theft of the note. The facts alleged by the prosecution were that the boy himself stole the note from his father, at the instigation of the accused. On these allegations I agree with the learned Sessions Judge that the accused should have been charged with abetment of the theft under section 379/109 and

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with dishonestly receiving stolen property under section 411 of the Indian Penal Code. The Judge found that there was no evidence that the accused instigated the boy to commit the theft, excepting the evidence of the boy himself, and did not think it safe to rely on the boy's statement in the absence of any corroboration. He was, however, satisfied that the accused received the note from the boy knowing it to be stolen property. He, accordingly, altered the conviction under section 379 to one under section 411 of the Indian Penal Code.

It has been argued on the merits that there is no evidence to prove the guilt of the accused under section 411 of the Indian Penal Code apart from the boy's own statement which the learned Judge considered insufficient to prove the allegation that the accused instigated the boy to commit the theft, and, therefore, the boy's evidence should be held insufficient to prove that he delivered the stolen note to the accused. The boy's statement that he delivered the hundred rupee note to the accused does, however, receive some corroboration from the facts that the accused, when he was arrested with the boy, had a note of Rs. 100 in his possession, and that he unsuccessfully tried to conceal the fact that he had the note in his possession. In these circumstances I think it was perfectly open to the court to find that the boy's statement, about handing over the stolen note to the accused, was true. The accused must have known that this note was stolen property. I think there are no grounds whatever for setting aside the conviction under section 411 upon the merits.

It has been further argued that the learned Sessions Judge had no jurisdiction to alter the conviction under section 379 to one under section 411 of the Indian Penal Code. It is conceded that under section 235 of the Code of Criminal Procedure the Magistrate was empowered to charge the accused with offences under sections 363 and 379 and to try him at one trial on both charges,

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as the alleged offences were so connected together as to form the same transaction. It is argued, however, that when the provisions of section 235 are utilized, by way of an exception to the general rule laid down in section 233, then no other section (such as section 236) which imports an exception to that general rule can also be brought into use. In other words, the provisions of sections 235 and 236 are said to be mutually exclusive. It is urged, therefore, that as the provisions of section 235 have been relied upon for the purpose of trying the two offences under sections 363 and 379, no recourse can be had to the provisions of section 236, and, therefore, the provisions of section 237 also cannot be utilized for the purpose of altering the conviction under section 379 of the Indian Penal Code to one under section 411 of the Indian Penal Code. I have been referred to the ruling in *Emperor* v. *Janeshar Das* (1), in which it was held by a single Judge of this Court that the provisions of sections 234, 235 and 236 were mutually exclusive. The facts of that case were very different from the facts of the case before me, and the main reason for holding that the trial in that case was illegal was that the two persons, who were being jointly tried, had been charged with three offences and each offence was framed in the alternative either of criminal breach of trust or abetment thereof. The result was that the accused had to meet six distinct sets of circumstances, and this was contrary to the spirit of the provisions of section 233. In the present case no questions arise about undue multiplicity of charges, or about the joint trial of two or more offenders. The ruling, therefore, does not appear to be directly applicable to the present case, although it does contain a remark that supports the applicant's contention.

In the present case the accused was alleged to have (1) instigated a boy to commit theft and (2) dishonestly received stolen property from the boy and (3) kidnapped the boy from lawful guardianship. These acts formed

(1) (1929) I.L.R., 51 All., 544.

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a series and were so connected together as to form the same transaction. Looking at the provisions of section 235(1) alone, apart from anything else in the Code, I think it is clear that the accused could (and in my opinion should) have been charged with, and tried at one trial for, offences under sections 379/109, 411 and 363 of the Indian Penal Code. As a matter of fact the Magistrate charged him with offences under sections 379 and 363 of the Indian Penal Code. I think the Magistrate was wrong in framing the charge under section 379 of the Indian Penal Code, because no one alleged that the accused himself committed the theft.

Now the question arises whether the provisions of section 236 could not be utilized as supplementing the provisions of section 235(1). Supposing the Magistrate were doubtful which of several offences the provable facts would constitute, e.g., whether they would constitute an offence of theft, or of abetment of theft, or of receiving stolen property, in addition to the offence of kidnapping; would he not, in such circumstances, be authorized under section 235(1) read with section 236 in charging him with offences under sections 379, 379/109, 411 and 363 of the Indian Penal Code and in trying him for every such offence? I cannot see anything in the Code or in the requirements of justice which prohibits such procedure. On the contrary such procedure seems to me to be expressly authorized by the Code. It cannot be said that the accused would be embarrassed by having to meet a larger number of charges than the legislature contemplated. Illustration (*a*) to section 236 shows clearly that a man may be charged, in respect of the same act, with theft, receiving stolen property, criminal breach of trust and cheating, i.e., with four charges in respect of one act. I cannot understand why sections 235 and 236 should be regarded as mutually exclusive so that whenever a person is tried for two or more offences committed in the course of the same transaction, section 236 must be deemed to

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have been expunged from the Code. It is a general rule of interpretation that effect must be given to every part of a statute and I see no reason in the present case why section 235(1) should not be supplemented by section 236. On this view the accused could have been charged under section 236 with an offence under section 411 of the Indian Penal Code in addition to an offence under section 379 of the Indian Penal Code. It follows that under section 237 the appellate court was justified in convicting the accused under section 411 of the Indian Penal Code, although he had not been expressly charged with that offence.

Even if I am wrong in my view, there is another reason for refusing to interfere in revision. The trial court was clearly empowered to frame a charge under section 411 of the Indian Penal Code in addition to the charge of theft, by reason of the provisions of section 235(1) of the Code of Criminal Procedure alone, leaving section 236 out of account.

Now under sections 535 and 537 of the Code of Criminal Procedure I am prohibited from setting aside the conviction and sentence as invalid merely on the ground that no charge was framed under section 411 of the Indian Penal Code or on the ground that a charge was wrongly framed under section 379 of the Indian Penal Code unless I consider that a failure of justice has in fact been occasioned thereby. In this case there has been no failure of justice. The accused had to admit that, when he was caught with the boy, he had a hundred rupee note in his possession. His case was that the note belonged to him and that it had not been made over to him by the boy. The court found that the note was stolen property received from the boy. It cannot be said that the accused was prejudiced by not having to meet a specific charge of receiving stolen property. The result of a retrial upon a charge under section 411 would be a foregone conclusion.

For this reason also I reject the application. The applicant must surrender to his bail and serve the remainder of his sentence.

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FULL BENCH.

Before Mr. Justice Mukerji, Mr. Justice Banerji, Mr. Justice Kendall, Mr. Justice King and Mr. Justice Sen.

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November, 12

ANAND PRAKASH AND ANOTHER (APPLICANTS) v. NARAIN DAS DORI LAL AND ANOTHER (OPPOSITE PARTIES).*

Provincial Insolvency Act (V of 1920), sections 2(d) and 28 (2)—"Property" of insolvent—Hindu law—Joint family property—Insolvency of father—Whether son's share vests in receiver—Whether receiver entitled to sell son's share—Stare decisis.

When the father, in a joint Hindu family governed by the Mitakshara law, is adjudicated an insolvent, then, assuming that the debts payable by the father are such that it is the pious duty of the son to pay them, the son's share in the joint family property does not vest in the receiver; but it is open to the receiver to seize the son's share and sell it in order to satisfy the debts of the father.

[*Per* MUKERJI, BANERJI and KING, JJ.—The right which the father has to sell the son's share as well, in order to pay his own debts where the debts are such that it is the pious duty of the son to pay them, is a valuable right or thing which can be turned into money for paying off the insolvent's debts and is "property" coming within the scope of the expression "the whole of the property of the insolvent" in section 28(2) of the Provincial Insolvency Act. This right or power of the father accordingly vests in the receiver.]

[*Per* SEN, J.—The disposing power possessed by the father, in certain circumstances, over the undivided shares of the sons is not a "power" in the technical sense of the term. It is not an absolute and unconditional power of disposition. It is not "property" within the meaning of sections 2(*d*) and 28 (2) of the Provincial Insolvency Act so as to vest in the receiver. But although the right of the receiver to attach and sell the son's share is not supported by the express text of the Provincial Insolvency Act, yet having regard to the sons' undoubted liability for the untainted debts of the father and

*Second Appeal No. 7 of 1928, from an order of H. Beatty, District Judge of Moradabad, dated the 16th of January, 1928.