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and property of his two minor brothers and to the furnishing of accounts and the drawing of an allowance from the Court. The property should be made over to Chandrapal Singh as *karta* of the joint Hindu family.

Appeal allowed.

APPELLATE CRIMINAL

Before Mr. Justice E. M. Nanavutty

1935
February, 15

BHAGGAN (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

Criminal Procedure Code (Act V of 1898), section 239—Indian Penal Code (Act XLV of 1860), sections 411 and 414—Stolen property—Possession obtained by several thefts—Joint trial of persons in possession or assisting in disposing of the property, if justified—Joint trial in violation of section 239, Cr. P. C.—No failure of justice or prejudice to accused—Trial, whether illegal or void—Dishonestly receiving or retaining stolen property—Accused having no knowledge or reason to believe the property to be stolen—Conviction on suspicion, if justified.

If more than one offence of theft has been committed in respect of certain property which could be designated as stolen property, within the meaning of section 410 of the Indian Penal Code, then the persons in possession of such stolen property which has been secured by means of the commission of several offences of theft or robbery, etc., cannot be tried jointly according to the provisions of clause (*f*) of section 239 of the Code of Criminal Procedure. Separate trial is the rule and joint trial is the exception and a joint trial can only be justified if the provisions of section 239 of the Code can be applied.

A joint trial in violation of the express provisions of section 239 of the Code of Criminal Procedure is not illegal or void *ab initio*, if it has not occasioned a failure of justice and has not prejudiced the accused in his defence on the merits. *King-Emperor* v. *Subramanya Iyer* (1), referred to.

*Criminal Appeal No. 252 of 1934, against the order of Pandit Bishu Nath Hukku, Assistant Sessions Judge of Bahraich, dated the 13th of August, 1934.

(1) (1901) I.L.R., 25 Mad., 61.

Where there is nothing in the evidence on the record to show that accused knew or had reason to believe that the property in his possession was stolen property, he could not be legally convicted of voluntarily assisting in disposing of stolen property under section 414 of the Indian Penal Code. The word "believe" in section 411 of the Indian Penal Code is much stronger than the word "suspect", and involves the necessity of the prosecution showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property which he was dealing with was stolen property and he could not be convicted of an offence under section 411 of the Indian Penal Code on mere suspicion. *Suraj Prasad* v. *King-Emperor* (1), relied on.

Mr. *Matinuddin*, for the appellant.

Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

NANAVUTTY, J.:—This is an appeal against the judgment of the learned Assistant Sessions Judge of Bahraich convicting the appellant Bhaggan butcher of an offence under section 411 of the Indian Penal Code, and sentencing him to five years' rigorous imprisonment.

I have heard the learned counsel for the appellant as also the learned Assistant Government Advocate and perused the evidence on the record.

The story of the prosecution is briefly as follows: On the night between the 18th and 19th of May, 1934, two cows belonging to Badlu were stolen from his house in village Daulatpur-Kaundah, and on the same night a cow belonging to Sahib Din of village Surajbali was stolen from the jungle where it was left grazing. Badlu went in search of his cows accompanied by one Bechan Khan, and while they were near the house of Ramzani they saw the accused Bhaggan taking a cow with him, which Badlu recognized as his. Badlu and his companion caught Bhaggan and also took posses-

(1) (1929) 6 O.W.N., 209.

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sion of the cow and made a report, exhibit 1, at the police station. Bhaggan stated that he had purchased three cows, namely the one which was found in his possession by Badlu and another cow which was tied at his house, and a third cow which he had slaughtered but the skin of which was lying at his house. Badlu and Bechan were sent with two constables to Bhaggan's house to fetch the other cow and the hide. At the house of Bhaggan Ganga Din was found too, and he was taken into custody. Badlu identified the hide as that of one of his cows. The investigating police officer, after completing his investigation, prosecuted four persons, namely Bhaggan, Ganga Din, Gaya Din and Bisheshar under sections 411, 414 and 379 of the Indian Penal Code. The learned Assistant Sessions Judge convicted Bisheshar of an offence under section 379 of the Indian Penal Code and sentenced him to 3 years' rigorous imprisonment. He convicted Gaya Din and Ganga Din of an offence under section 411 of the Indian Penal Code and sentenced each of them to three years' rigorous imprisonment, and he convicted Bhaggan of an offence under section 411 read with section 75 of the Indian Penad Code and sentenced him to five years' rigorous imprisonment. The trial of all four accused was held jointly.

Before I discuss the case of the appellant on the merits, I think it proper to dispose of the legal plea raised on behalf of the appellant by his learned counsel. It has been argued before me that the joint trial of Bhaggan, along with the other accused, was illegal in view of the provisions of section 239, clause (*f*) of the Code of Criminal Procedure.

Clause (*f*) of section 239 of the Code runs as follows:

"Persons accused of offences under section 411 and 414 of the Indian Penal Code, or either of these sections, in respect of stolen property, the possession of

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which has been transferred by one offence may be charged and tried together."

The admitted facts of the case are briefly that two cows were stolen from the house of Badlu in village Daulatpur Kaundah, and the other cow belonging to Sahib Din was stolen from village Suraj Bali. It is thus clear that two offences of theft were committed on the night between the 18th and 19th of May, 1934, in respect of cows belonging to two different persons. Ganga Din and Gaya Din were the persons who first received these stolen cows and they sold the three cows to Bhaggan. Now clause (*f*) of section 239 of the Code of Criminal Procedure clearly lays down that the stolen property in respect of which several persons may be charged under section 411 of the Indian Penal Code must be stolen property, the possession of which had been transferred by one offence. Section 410 of the Indian Penal Code which defines "stolen property" runs as follows:

"Property the possession whereof has been transferred by theft or by extortion or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed is designated as stolen property."

It is thus clear that if more than one offence of theft has been committed in respect of certain property which could be designated as stolen property, within the meaning of section 410 of the Indian Penal Code, then the persons in possession of such stolen property which has been secured by means of the commission of several offences of theft or robbery, etc., cannot be tried jointly according to the provisions of clause (*f*) of section 239 of the Code. The general principle is that it is always necessary to justify a joint trial and to point out provisions under which it can be held. Separate trial is the rule and the joint trial is the exception and such a joint

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trial can only be justified if the provisions of section 239 of the Code can be applied.

In the present case I am clearly of opinion that the joint trial of the accused Bhaggan with the other accused cannot be justified by reference to the provisions of section 239, clause (*f*) of the Code.

The learned counsel for the appellant has argued that this violation of the express provisions of section 239 of the Code as to the mode of trial amounts to an illegality, and renders the whole trial void, and in support of his contention he has relied upon a Privy Council ruling reported in *King-Emperor* v. *Subramanya Iyer* (1). This question of law raised in appeal before me was never raised in the trial Court nor was it raised in the grounds of the memorandum of appeal prepared and filed by the learned counsel for the appellant. In my opinion it is not every breach of any provision in the Code of Criminal Procedure that amounts to an illegality and vitiates the trial. In the present case I am clearly of opinion that the irregularity committed by the learned Assistant Sessions Judge has not occasioned a failure of justice, nor has it prejudiced the appellant Bhaggan in his defence on the merits, and I am, therefore, not prepared to hold that the whole trial of the appellant before the Court of Session was illegal and void *ab initio*.

I come next to discuss the case of the appellant on the merits. The case against the appellant rests mainly upon suspicions. In *Suraj Prasad* v. *King-Emperor* (2), a learned Judge of this Court, the late Mr. Justice RAZA, pointed out that if there was nothing in the evidence on the record to show that the accused knew or had reason to believe that the property in question was stolen property, he could not be legally convicted of voluntarily assisting in disposing of stolen property under section 414 of the Indian Penal Code, and that

(1) (1901) I.L.R., 25 Mad., 61. (2) (1929) 6 O.W.N., 209.

the word "believe" in section 411 of the Indian Penal Code was much stronger than the word "suspect", and involved the necessity of the prosecution showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property which he was dealing with was stolen property, and that it was not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiries to ascertain whether it had been dishonestly acquired.

The learned counsel for the appellant complains that the learned Assistant Sessions Judge has allowed his mind to be influenced by the fact that the appellant is an ex-convict, and has based the conviction of the appellant mainly upon his own suspicions, and has not looked at the facts of the case in their true perspective. In my opinion there is force in this contention of the learned counsel for the appellant. In the first place there is no mention in the first information report that one of the stolen cows was a milch cow, obviously worth something like 30 to 40 rupees. P. W. 2 Waris Ali, who has verified exhibit 2, which is the receipt showing that the appellant Bhaggan purchased three cows worth Rs.17 from Bisheshwar, has himself deposed in cross-examination that he did not suspect the cows to be stolen property otherwise he would not have written out the receipt, exhibit 2. P. W. 3, Joghi, who is a prosecution witness and an Ahir by caste, has deposed in examination-in-chief, that he could not say if any of the cows in the possession of Gaya Din and Ganga Din and Bisheshar was a milch cow. Now if the evidence of these witnesses is to be believed, then it is clear that no milch cow was sold to Bhaggan. The same conclusion is to be drawn from the first information report, exhibit 1, which has been verified by the evidence of

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Head Constable Nazim Ali, examined on behalf of the accused as D. W. 1. This first information report also does not mention the fact that one of the cows belonging to Badlu that had been stolen was a milch cow.

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Thus we have on the record not only the evidence of Nazim Ali together with the first information report, exhibit 1, but also the testimony of two prosecution witnesses Waris Ali, P. W. 2 and Joghi, P. W. 3, which goes to show that none of the cows stolen was said to be a milch cow. On the other hand there is the evidence of P. W. 5, Chhedi and P. W. 1, Badlu, the complainant, who have deposed that one of the cows stolen was a milch cow worth Rs.35 or so. The evidence on the record leaves me in doubt as to whether in fact one of the cows stolen was a milch cow or not, and where the matter is doubtful the benefit of the doubt must be given to the accused. P. W. 9, Salaru Kasab, has deposed that he used to sell the meat of one cow for Rs.5 and its hide for Re.1 or Rs.1-4. Thus the average value of a cow sold for purposes of slaughter would be about six or seven rupees. The value of the three cows sold to the appellant Bhaggan is given in the receipt as Rs.17. It cannot, therefore, be said that the price paid by the appellant was such as to create a reasonable belief in the mind of the Court that the appellant knew or had reason to believe that the cows sold to him were stolen property. The fact that after the purchase of the cows Bhaggan slaughtered one of them the next day is a piece of circumstantial evidence which, to my mind, does not incriminate him in the least. The profession of Bhaggan was that of a butcher, and it was his business to slaughter cows and dispose of their meat, and no inference inimical to the accused can legitimately be drawn from the fact that the accused after purchasing the cows slaughtered one of them the next day.

When the complainant Badlu was examined in the Court of Session he verified the first information report and only objected to the price entered in the first information report. He did not state then that one of the cows stolen was a milch cow, and that the thana Munshi had deliberately omitted to note that fact.

The fact that Ganga Din was discovered in the house of Bhaggan after Bhaggan had been arrested can hardly be taken as a piece of circumstantial evidence against Bhaggan. The evidence on the record goes to show that it was the women-folk of Bhaggan who handed over Ganga Din to the police. This shows real *"bona fides"* on their part and not a guilty knowledge on the part of the accused Bhaggan or of any association by him with Ganga Din. The statement in the judgment of the learned Assistant Sessions Judge regarding the association of Ganga Din and Bhaggan is not borne out by any evidence on the record. The fact that Bhaggan used to purchase cows from Ganga Din and Gaya Din will not show that he had any criminal association with these two men in organizing cattle thefts and in disposing of stolen property. The statement of the learned Assistant Sessions Judge that Ganga Din and Gaya Din after coming into contact with Bhaggan, who was a previous convict, had taken to the profession of cattle lifting is a statement which is based upon mere conjecture and is not founded upon any tangible evidence. Equally unjustifiable appear to me the strictures passed by the learned Assistant Sessions Judge upon the conduct of the police of Nanpara. The police officers concerned were not on their defence, and the question whether they were or were not at fault is a matter quite alien to the consideration of the question of the guilt or innocence of the accused Bhaggan.

All the circumstances noted by the learned Assistant Sessions Judge as furnishing strong proof of the guilt of Bhaggan are to my mind not capable of bearing that

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interpretation. There is no proof of any illicit association between Bhaggan and the other accused Ganga Din and Gaya Din. There is no proof on the record of Bhaggan having actually purchased a milch cow worth Rs.35. The fact that after purchasing the cows Bhaggan slaughtered one of them in the course of his business is not a piece of evidence which can in any way incriminate him. The arrest of Ganga Din at the house of Bhaggan is also not a piece of circumstantial evidence which can in any way incriminate Bhaggan himself. The fact that the stolen cows were sold the day after the theft to Bhaggan is also not a piece of evidence that can in any way serve to prove that Bhaggan had guilty knowledge that the cows were stolen property. The price paid by Bhaggan for the three cows is also on the evidence of P. W. 9 Salaru not an abnormally low price. The fact that Bhaggan had the sale registered and obtained a formal receipt, exhibit 1, goes to show his good faith rather than the reverse.

In my opinion the evidence on the record does not prove that Bhaggan knew or had reason to believe that the cows sold to him were stolen property.

For the reasons given above, I allow this appeal, set aside the conviction and sentence passed upon the appellant, and acquit him of the offence charged. The appellant is on bail. His bail bond is concelled.

Appeal allowed.