## REVISIONAL CRIMINAL

*Before Mr. Justice Bisheshwar Nath Srivastava*

KUNWAR SEN (ACCUSED-APPLICANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1932
*November*, 2

*Criminal Procedure Code (Act V of 1898), sections 350(1)(a) and 235 and 255—Trial Magistrate recalling witnesses on the request of accused and not* suo moto*—Trial, whether* de novo*—Charge, if to be framed afresh—Evidence Act (I of 1872), sections 10 and 30—Evidence of an accused during trial, if admissible in evidence against another accused—Specific acts of cheating and forgery, if can be tried jointly along with the charge of conspiracy—Indian Penal Code (Act XLV of 1860), section 420—Cheating—Issuing a cheque, knowing that it would be dishonoured—Offence of cheating, whether committed—Accused pleading guilty—Magistrate, how far bound to convict accused on his plea of guilty.*

Where the trying magistrate did not act *suo moto* but on the request of the accused under section 350(1)(*a*) of the Code of Criminal Procedure recalled and reheard certain witnesses it could not be regarded as a *de novo* trial and the charge already framed by the previous magistrate cannot be considered to be wiped out. *T. Sriramulu* v. *K. Veerasalingam* (1), relied on.

Section 30 of the Evidence Act applies only to statements made before and proved at the trial. The expression "is proved" used in this section seems hardly applicable to statements made at the trial. Section 10 of the Evidence Act refers to things said or done by a conspirator in reference to their common intention. Any statement made by an accused person during the trial can hardly be regarded as a statement by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. Therefore the statement of the accused made in the course of the trial are not admissible against the other accused, either under section 10 or section 30 of the Evidence Act. *Emperor* v. *Mahadeo Prasad* (2), *Govinda Naida* v. *Emperor* (3), and *Emperor* v. *Abani Bhushan Chuckerbutty* (4), relied on.

* Criminal Revision No. 90 of 1932, against the order of H. J. Collister, Sessions Judge of Lucknow, dated the 12th of August, 1932.

(1) (1914) I. L. R., 38 Mad., 585. (2) (1923) I. L. R., 45 All., 323.
(3) (1929) A. I. R., Mad., 285. (4) (1910) I. L. R., 38 Cal., 169.

The joinder of charges for specific acts of cheating and forgery with the charge of conspiracy, at one trial is not illegal specially in a case where the specific counts of cheating as well as forgery are so closely connected that they really form part of one and the same transaction. *Abdul Salim* v. *Emperor* (1), referred to.

Where a person issues cheques which are dishonoured and from the circumstances it could be presumed that he must have been aware that the cheques would be dishonoured so that the failure to meet payment of the cheques is not accidental he is guilty of cheating under section 420 of the Indian Penal Code.

Section 255 of the Code of Criminal Procedure allows the Magistrate discretion to convict an accused on his plea of guilty, but he is not bound to do so.

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

SRIVASTAVA, J. :—Five persons Sat Narain, Kunwar Sen, Babu Lal, K. K. Kapani and Daulat Ram were prosecuted for an offence of criminal conspiracy to start a bogus bank under the name of the Great Eastern Bank, Ltd., with a view to cheat persons who may have had occasion to deal with it, under section 120B read with section 420 of the Indian Penal Code, for some specific acts of cheating in furtherance of the said conspiracy under section 420 of the Indian Penal Code and for forgery under sections 465 and 471 of the Indian Penal Code. They were tried by Mr. S. M. Zahid, a Magistrate of the first class, Lucknow. They were all convicted under section 120B/420 of the Indian Penal Code and some of them also under one or other or both of the other sections. Kunwar Sen, Sat Narain, Babu Lal and Daulat Ram appealed against their convictions and sentences to the Sessions Judge of Lucknow. The result of his findings was that he sustained the conviction of Kunwar Sen under section 120B/420 and under section 420 but reduced the sentence under section 120B/420 from one of two years' rigorous imprisonment and a fine of Rs.500 to rigorous imprisonment for one year and nine months

(1) (1921) I. L. R., 49 Cal., 573.

1932

KUNWAR SEN v. KING-EMPEROR

*Srivastava, J.*

only. The sentence of one year's rigorous imprisonment under each of the two charges under section 420 of the Indian Penal Code passed against him by the Magistrate was maintained. The Sessions Judge set aside the convictions of Babu Lal on the two charges under section 420 but dismissed his appeal in respect of his conviction under sections 120B/420 and 465/471 of the Indian Penal Code. He also maintained the sentence of eighteen months' rigorous imprisonment and a fine of Rs.200 passed against him under section 120B/420 and the sentence of one year's rigorous imprisonment for the two offences under section 465/471 of the Indian Penal Code. In the case of Daulat Ram who was convicted by the Magistrate only under section 120B/420 of the Indian Penal Code and sentenced to six months' rigorous imprisonment, the learned Sessions Judge dismissed the appeal and upheld the conviction as well as the sentence. It is not necessary for me to mention the sentences passed on the other two accused Kapani and Sat Narain because their cases are not before me.

Kunwar Sen, Babu Lal and Daulat Ram have applied to this Court in revision. The first contention which is common to all the three applications is that the procedure adopted by the trying Magistrate was in contravention of the provisions of section 350 of the Code of Criminal Procedure and that the convictions are liable to be set aside on this ground. It is necessary to state a few facts in connection with this plea. The trial of the accused started in the court of Mr. Muhammad Hasan. On his transfer from the district after some of the prosecution evidence had been recorded and charge sheets had been framed, the case was transferred to the file of his successor Mr. S. M. Zahid. When the case was taken up by the latter on the 9th of April, 1931, all the accused except Kunwar Sen stated that the proceedings before him should be started from the stage at which they were left by his predecessor but Kunwar Sen stated that he wanted fresh proceedings (*az sare nau karrawai*). The Magistrate

accepted this request and proceeded to record the statements of the prosecution witnesses afresh. On the 25th of June, 1931 the order sheet shows that all the accused stated to the Magistrate that they did not want one of the prosecution witnesses who had already been examined by his predecessor to be examined again nor did they want to cross-examine him further. They agreed that his statement previously recorded may be used in the case. On the same date the Magistrate by his English order decided that the former charges framed by his predecessor should stand. In the course of his order he observed that the accused had only re-called the witnesses under sections 320(1)(*a*) of the Code of Criminal Procedure. In his final judgment also he remarked that he did not accede to the accused's request that fresh charges should be framed because he was of opinion that under section 350 of the Code of Criminal Procedure the accused are only entitled to claim that any prosecution witness whom they wanted, should be recalled, but this did not have the effect of a *de novo* trial. The proceedings set forth above show that in this case the trying Magistrate did not act *suo moto* but on the request of one of the accused under section 350(1)(*a*). The fact that the accused did not want to recall Lal Chand also shows that the trial before Mr. Zahid was not regarded as a trial *de novo*. I therefore agree with the learned Sessions Judge that the trial before Mr. Zahid was not a fresh trial but all that was intended was that the prosecution witnesses should be re-summoned and re-heard.

It was also argued that even though the proceedings might show that a *de novo* trial was not intended, yet under the provisions of section 350 of the Code of Criminal Procedure, the trial before the second Magistrate when the accused demanded that the witnesses or any of them be re-examined and re-heard must be regarded in law as a fresh trial necessitating the framing of a fresh charge. The interpretation of section 350 is by

1932

KUNWAR SEN v. KING-EMPEROR

*Srivastava, J.*

no means free from doubt but it is to be noticed that the section provides for two cases, one in which the Magistrate himself decides to "re-summon the witnesses and re-commence the inquiry or trial", and the other in which the accused demand "that the witnesses or any of them be re-summoned or re-heard". The present case is admittedly one of the last-mentioned class. The words "re-commence the inquiry or trial" have not been used in sub-clause (*a*). So whatever might be the interpretation as regards cases falling under the first class, I do not think that in a case like the present one, the Legislature intended that the charge already framed should be considered to be wiped out. This view is supported by the decision of the Madras High Court in *T. Sriramulu* v. *K. Veerasalingam* (1). I must therefore overrule the contention.

The next plea which has been raised in all the three applications before me is that the statements of Daulat Ram and Kapani made under section 342 of the Code of Criminal Procedure and the statement of Kapani made under section 164 of the Code of Criminal Procedure are inadmissible against the applicants. I am of opinion that the statements of Daulat Ram and Kapani made in the course of the trial, under section 342 are not admissible but the statement of Kapani under section 164 is. The learned Assistant Government Advocate has sought to make the statements made under section 342 admissible under sections 30 and 10 of the Indian Evidence Act. To my mind section 30 applies only to statements made before and proved at the trial. The expression "is proved" used in this section seems hardly applicable to statements made at the trial. There appears to have been some conflict of judicial opinion as regards the interpretation of section 30. I am inclined to agree with the reasoning contained in *Emperor* v. *Mahadeo Prasad* (2) and *Govinda Naidu* v. *Emperor* (3). Section 10 of

(1) (1914) I. L. R., 38 Mad., 585. (2) (1923) I. L. R., 45 All., 323
(3) (1929) A. I. R., Mad., 285.

the Evidence Act refers to things said or done by a conspirator in reference to their common intention. Any statement made by an accused person during the trial can hardly be regarded as a statement by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. The same view was taken in *Emperor* v. *Abani Bhushan Chuckerbutty* (1) in which it was held that section 10 was intended to make as evidence, communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between the conspirators or between conspirators and other persons with reference to the conspiracy. I must therefore hold that the statements of Daulat Ram and Kapani made in the course of the trial are not admissible against the applicants.

As regards the statement of Kapani made under section 164, it was argued that when Kapani in the course of the trial pleaded guilty, he should have been convicted forthwith and the joint trial of the applicants with Kapani should have been deemed to have come to an end as soon as the plea of guilty had been recorded. Section 255 of the Code of Criminal Procedure allows the Magistrate discretion to convict an accused on his plea of guilty but he is not bound to do so. Kunwar Sen applicant has made an application under section 428 of the Code of Criminal Procedure for reception of additional evidence in this Court. This additional evidence consists of two applications which it is said Kapani intended to make to the Magistrate in which it was alleged that the confession made by him was not voluntary. I will deal with this application of Kunwar Sen later. I have referred to it at this place only to show that the nature and circumstances of the case were such that the Magistrate exercised

(1) (1910) I. L. R., 38 Cal., 169.

1932

KUNWAR SEN v. KING-EMPEROR

his discretion wisely in trying the charge against Kapani in spite of his plea of guilty.

It was also argued that the confession of Kapani was inadmissible because it had not been sufficiently corroborated in material particulars. I am unable to accede to this argument. Evidence in corroboration need not be direct. In the present case it seems to me that there is ample circumstantial evidence to corroborate the confessional statement of Kapani in material particulars. Another ground of law urged by all the applicants is that the joinder of charges for specific acts of cheating and forgery with the charge of conspiracy, at one trial was illegal. In my opinion this argument also has no substance. Section 235 provides that if in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. In the present case the specific counts of cheating as well as forgery committed in regard to the minutes of the proceedings of the board of directors of the proposed bank are all so closely connected that they really form part of one and the same transaction. The case is in some respects analogous to the case reported in *Abdul Salim* v. *Emperor* (1). In this case also their Lordships of the Calcutta High Court repelled the plea about misjoinder of charges.

*Srivastava, J.*

Lastly it was argued that on the facts proved it was not established that the applicants were members of the conspiracy or that they were guilty of the other offences of which they have been convicted. Excluding the statements of Daulat Ram and Kapani made under section 342 of the Code of Criminal Procedure, I am of opinion that the rest of the evidence is more than ample to establish that all the three applicants were members of the conspiracy. It would not serve any useful purpose to recapitulate all the evidence which has been discussed

(1) (1921) I. L. R., 49 Cal., 573.

1932

KUNWAR SEN v. KING-EMPEROR

Srivastava, J.

with care by the learned Sessions Judge. Specific acts done by each of the applicants have been established showing their connection with the common intention of the accused. Such common intention having been established by these specific acts of each of the accused, they are also admissible in evidence against the other accused under section 10 of the Evidence Act. I must therefore accept the finding of the learned Sessions Judge that the charge of conspiracy has been satisfactorily made out against all the applicants.

Next as regards the two specific charges of cheating against Kunwar Sen. These charges are based on two cheques issued by Kunwar Sen, one in part payment of the price of a counter ordered by him for the proposed bank and the other issued in favour of the Methodist Publishing House for printing charges in respect of certain forms printed for the said bank. Both these cheques which were issued on the Muslim Bank, Lahore, were dishonoured. Exhibit 148, the copy of Kunwar Sen's account with the Muslim Bank shows that his credit balance at the time when he issued the cheques and for some months previous to it, was Re.1 only. It seems therefore clear that his failure to meet payment of the cheques was not accidental. He must therefore be presumed to have been aware that the cheques would be dishonoured. I am therefore of opinion that his conviction on these two specific counts under section 420 is quite correct.

Lastly as regards the conviction of Babu Lal for forgery under section 465/471 of the Indian Penal Code. Exhibit 13 is the minute book of the proceedings of the directors of this bogus bank. It shows that a meeting of the board of directors was held on the 9th of May, 1927 and that Daulat Ram, Amjad Ali and Raja Bahadur were present at this meeting. The proceedings also purport to bear their signatures. All these persons have been examined and they have denied the alleged signatures and

1932

KUNWAR SEN v. KING-EMPEROR

*Srivastava, J.*

their presence at any such meeting. It has been sufficiently proved that the proceedings in question are in the handwriting of Babu Lal and bear his signature. These minutes were also sent by Babu Lal to the Registrar of Co-operative Societies with a view to his getting a commencement certificate and in order to induce the Registrar to stay proceedings under section 247 of the Companies Act. These facts, as found by both the lower courts, fully establish these charges against Babu Lal. I can therefore see no ground for interference with his conviction under section 465/471 of the Indian Penal Code.

Mention has already been made above of the application made by Kunwar Sen under section 428 of the Code of Criminal Procedure. As already stated, these alleged applications were never filed. We know nothing of the circumstances under which they were written or of the reasons for their not being filed. No attempt was made to produce them in any of the two lower courts, and there is no evidence before me that the applications are really in the handwriting of Kapani. I cannot therefore see my way to admit these private copies at this stage. Even if they are admitted in evidence I do not think they can affect the result.

There remains only the question of sentence. As remarked by the learned Sessions Judge, Daulat Ram has got off with a comparatively light sentence. But there were reasons for the Magistrate taking a lenient view of his case. It does not therefore call for any interference. As regards the sentences passed against Kunwar Sen and Babu Lal under section 120B/420, the learned Sessions Judge held that as the proposed bank was never actually opened because a commencement certificate could not be obtained, the maximum sentence which could be awarded against them, in the light of section 116 of the Indian Penal Code, was only one-fourth of the maximum sentence provided for the substantive offence. The maximum sentence prescribed by section 420 is seven years' rigorous

imprisonment. Thus it will appear that Kunwar Sen has been awarded the maximum sentence for the offence of conspiracy. Babu Lal also has been awarded a sentence of eighteen months' rigorous imprisonment together with a fine of Rs.200 when the maximum which could be awarded against him was one year and nine months. As the specific acts of cheating proved against Kunwar Sen and the offence of forgery established against Babu Lal are parts of the same transaction, I think in the circumstances the sentence for cheating passed against Kunwar Sen and the sentence of forgery passed against Babu Lal should run concurrently and not consecutively with the sentence for conspiracy passed against both these accused.

*Srivastava, J.*

I modify the order of the lower court accordingly. Subject to this modification I dismiss all the three applications. Babu Lal accused must surrender to his bail at once.

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava*

CHHEDI RAM (PLAINTIFF-APPELLANT) *v.* CH. AHMAD SHAFI AND OTHERS (DEFENDANTS-RESPONDENTS)*

1932 *November* 24

*Land Acquisition Act (I of 1894), sections 9, 18 and 31(2)—Person served with notice under section 9—Compensation awarded received by him without protest—Failure to make application for reference under section 18, Land Acquisition Act—Civil suit for recovery of compensation alleged to have been wrongly paid to other persons, maintainability of—Jurisdiction conferred on special court in particular matters by certain Act—Jurisdiction, whether exclusive.*

*Held*, that a person who is served with notice under section 9 of the Land Acquisition Act is bound to apply for a reference under section 18 when he is dissatisfied with the award and he cannot maintain the suit in the ordinary civil court to reopen the question. The proviso to section 31(2) must be given a limited application and a person who is a party to the apportionment proceedings cannot under that proviso

* Second Civil Appeal No. 399 of 1931, against the decree of Syed Khurshed Husain, Subordinate Judge of Unao, dated the 21st of September, 1931, reversing the decree of Pandit Brijnath Zutshi, Munsif of Safipur at Unao, dated the 30th of August, 1930.