APPELLATE CRIMINAL.

Before Fazl Ali and James, JJ.

BHIKHARI SINGH

v.

KING-EMPEROR.*

1934.

April, 19.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 196*A*, 309 *and* 476—*Penal Code*, 1860 (*Act XLV of* 1860), *section* 120*B*—*conviction under section* 120*B without sanction, if illegal, when prosecution under that section not within the contemplation of the officer making the complaint —charge for substantive offence—conviction for attempt or abetment or criminal conspiracy, whether legal—non-compliance with section* 309, *Code of Criminal Procedure, whether vitiates conviction in all cases.*

The mere omission to refer in terms to section 120B of the Penal Code in a complaint under section 476 of the Code of Criminal Procedure, 1898, may not be material if upon a reading of the complaint it should appear that a charge under section 120B was contemplated.

If a charge is framed for a substantive offence, a person may without any additional charge being framed be convicted of an attempt or abetment to commit that offence. But a person cannot be convicted of the offence of criminal conspiracy without there being a charge under section 120B. It would be violating the spirit underlying section 196A of the Code of Criminal Procedure if a person were allowed to be convicted of an offence under section 120B even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within the contemplation of the officer making the complaint under section 476.

Kali Singh v. *Emperor*(1), distinguished.

QUAERE: Whether non-compliance with section 309 of the Code of Criminal Procedure, 1898, vitiates the conviction in all cases?

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* Criminal Appeal no. 21 of 1934, from a decision of Rai Bahadur S. P. Chatterji, Sessions Judge of Patna, dated the 1st February, 1934.

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The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

S. Sinha and *P. N. Gour*, for the appellant.

Assistant Government Advocate, for the Crown.

FAZL ALI, J.—This is an appeal by one Bhikhari Singh who has been convicted under section 120B of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year. The circumstances under which the appellant was placed on his trial were as follows:

In execution of a rent decree obtained by Tribhuban Singh and others the holding of one Jhopari Chamar was sold and purchased by one Bhusi Singh. Within thirty days from the date of the sale on the 8th of July, 1933, an application accompanied with chalans was filed before the Munsif in whose court the execution proceedings were pending in which an offer was made to deposit the decretal amount and the court was asked " to fill in the amount and pass and check the chalans with reference to the record of the case so that the money may be deposited ". It is needless to state that the petition purported to be on behalf of Jhopari Chamar the tenant judgment-debtor. The prosecution case, however, is that in fact the petition had not been made by Jhopari Chamar but one Bajrangi Singh posing as Jhopari Chamar before the clerk who had written the petition and the Mukhtar who had endorsed his identification, has put his thumb mark on the petition and the chalans and one Deonandan Singh describing himself as Deoki Singh had signed the documents for the petitioner. It is also stated that the appellant Bhikhari Singh had introduced Bajrangi Singh as Jhopari Chamar to the pleader's clerk and supplied particulars of the case to enable him to draw up the petition and the chalans. Tribhuban Singh, one of

the decree-holders, who had been watching the movements of these persons, promptly brought the matter to the notice of the Registrar who after some enquiry reported the matter to the Munsif concerned. The Munsif started a proceeding under section 476 of the Code of Criminal Procedure and made a complaint to the Magistrate against Bajrangi Singh, Deonandan Singh and Bhikhari Singh, in which after referring to the facts of the case he stated in his complaint as follows:—

"The accused Bhikhari Singh and Deonandan Singh aided and abetted committing crime of forgeries in the aforesaid manner and are parties to forgeries. Having thus fabricated and forged the petition and the chalans the accused Bajrangi Singh, Bhikhari Singh and Deonandan Singh got the petition and chalans filed in the court in order to defraud this court and by means of this fraud to procure from the court orders to set aside the sale.....to the wrongful loss of the auction-purchaser Bhusi Singh for the wrongful gain of the accused Bajrangi Singh. A prima facie case has thus been made out against the accused for their prosecution under sections 465 and 471. I therefore complain against the abovenamed persons for their prosecution under sections 465 and 471 or under any other section that they may be found guilty."

These three persons were ultimately placed on their trial, the first two on charges under sections 465, 468 and 120B read with sections 468 and 471, Indian Penal Code, and Bhikhari Singh only on a charge under section 120B read with sections 468 and 471, Indian Penal Code. On the 25th January, 1934, the trial began and five persons were chosen as jurors, a note being made in the order-sheet that the same persons would act as assessors so far as the charge under section 120B, which was not triable by jury, was concerned. In his charge to the jury, however, the learned Judge does not appear to have stated that the persons who were acting as jurors were to act as assessors with regard to the charge under section 120B. At the conclusion of the trial the learned Judge recorded the verdict of the jury but he did not, as required by section 309 of the Code of Criminal Procedure, record the individual opinions of the assessors so far as the charge under section 120B was

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concerned. In his order-sheet of the 29th January, 1934, it is noted that

> "the court agreeing with four assessors and disagreeing with the fifth found the accused Bajrangi Singh and Bhikhari Singh guilty under section 120B",

but from the judgment it appears that this was a mistake. As a matter of fact the learned Judge has convicted the accused disagreeing with four of the assessors and agreeing with the fifth.

The conviction of the appellant is now attacked as illegal on the grounds of non-compliance with section 196A and section 309 of the Code of Criminal Procedure respectively. Section 196A provides that no court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code in a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government has, by order in writing, consented to the initiation of the proceedings. It is further provided that where the criminal conspiracy is one to which the provisions of sub-section (*4*) of section 195 apply, no such consent shall be necessary. It is not disputed that the prosecution of the appellant under section 120B was never sanctioned by the District Magistrate but it is urged on behalf of the Crown that no such sanction was necessary as the matter is covered by section 195, sub-section (*1*), clause (*c*). Under this clause no court can take cognizance of any offence described in section 463 or punishable under section 471, etc., when such offence is alleged to have been committed by any party to any proceeding in any court in respect of a document produced or given in evidence in such proceeding except on the complaint in writing of such court or of some other court to

which such court is subordinate. It is further provided that the provision of sub-section (*1*) with reference to the offences named therein apply also to criminal conspiracies to commit such offences and to the abetments of such offences and attempts to commit them. The question, therefore, to be considered is whether any complaint was made by the Munsif against the appellant charging him with an offence under section 120B.

It is conceded that the Munsif did not in terms refer to section 120B in his complaint, but the mere omission to refer to the section may not be material if upon a reading of the complaint it should appear that a charge under section 120B was contemplated. In this particular case, however, the omission to refer to section 120B is material because the Munsif definitely refers to those sections which in his opinion applied to the facts of the case. On a careful reading of the complaint the only legitimate inference that one can draw is that it did not occur to the Munsif that an offence under section 120B has been committed and the Munsif accordingly, while mentioning the specific sections under which the accused was chargeable, did not refer to section 120B. The fact that section 196A has been inserted in the Code of Criminal Procedure shows that the legislature is anxious that prosecutions under section 120B should not be started indiscriminately. It would, therefore, in my opinion, be violating the spirit underlying section 196A if a person were allowed to be convicted of an offence under section 120B even though his prosecution under that section is neither sanctioned by the District Magistrate nor was within the contemplation of the officer making the complaint under section 476. The question still arises whether any significance can be attached to the fact that proviso (*4*) relates not only to a criminal conspiracy to commit the offences mentioned in sub-section (*1*) but also to the "abetments of such offences and atempts to commit them". It is well settled that if a charge is framed for a

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substantive offence, a person may without any additional charge being framed be convicted of an attempt to commit that offence. He may similarly be convicted of abetment to commit that offence, though on this point conflicting views have been expressed in cases decided under the old Code. But I do not consider that a person can be convicted of the offence of criminal conspiracy without there being a charge under section 120B. In any case section 196A deals only with the case of criminal conspiracy and not with that of abetment of an offence or an attempt to commit that offence. In *Kali Singh* v. *Emperor*(1) it was held that the petition for sanction under section 195 is to be read with the order granting it and the latter is not bad for want of specification of the particulars required by clause (*4*) when they are contained in the petition. With this principle I respectfully agree and would point out that the facts of the case are clearly distinguishable from those of the present case. In that case a petition had been filed by the Deputy Inspector-General of Police, Criminal Investigation Department, Bengal, before the Munsif setting out in detail the facts constituting the offences for which the sanction was applied and asking him to prosecute the accused persons under section 120B read with sections 209, 467 and 471, Indian Penal Code. The effective part of the order passed in that application was that the application be allowed. In these circumstances the learned Judges who decided the case rightly pointed out that "if this order be read with the application all the details required by sub-section (4) have been supplied". In my opinion, therefore, there was no proper complaint under section 120B in this case and the conviction of the appellant was, therefore, illegal.

The second contention put forward on behalf of the appellant is also not without substance. Section 309 is mandatory and provides that when in a case

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tried with the aid of assessors the case for the defence and the prosecutor's reply, if any, are concluded, the court may sum up the evidence for the prosecution and the defence and then shall require each of the assessors to state his opinion orally and shall record such opinion and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded. As I have already stated, the learned Judge did not comply with these provisions with the result that we do not know the opinion which was respectively formed by the assessors about the guilt of the accused, nor do we know the ground on which such opinion was based. It is possible that if the learned Judge had proceeded to record the opinion of the assessors, he might have found it necessary, in the case of some of the assessors at least, to record the ground for such opinion. Without committing myself to the view as to whether non-compliance with the section would vitiate the conviction in all cases, I think that having regard to all the circumstances of the present case, the conviction of the appellant should not be upheld. I would, therefore, allow this appeal, set aside the conviction and sentence passed on the appellant.

JAMES, J.—I agree.

Appeal allowed.

Conviction set aside.

APPELLATE CIVIL.

Before Macpherson and Dhavle, JJ.

GAURI DUTT MARWARI

v.

D. K. DOWRING.*

1934.

November, 21, 22, 23, 27, 28, 29, 30.

April, 19.

Registration Act, 1908 (*Act XIV of* 1908), *section* 17—*deed releasing property from attachment before judgment*,

* Appeals from Original Decrees nos. 1 of 1929 and 14 of 1930, from a decision of Mr. Saiyid Hasan, Subordinate Judge of Muzaffarpur, dated the 3rd May, 1928.