APPELLATE CRIMINAL.

Before Mr. Justice Dunkley, and Mr. Justice Wright.

MAUNG SAR KEE *v.* THE KING.*

1939

Aug. 21.

Joint trial—Two accused charged with murder of one person—Evidence against accused mutually exclusive—Legality of trial—Same offence in the course of the same transaction—Criminal Procedure Code, ss. 239, 537.

When one accused is charged with having murdered a certain person at a certain time and at a certain place, and another accused is charged with having murdered the same person at about the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed one of the accused will have to be convicted, whereas if the other set of evidence is believed the other accused will have to be convicted, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction within the meaning of s. 239 (*a*) of the Criminal Procedure Code. When the prosecution evidence against two persons is mutually exclusive there is no provision in the Code under which they can be tried together, and a joint trial is therefore an illegality which cannot be cured by s. 537 of the Code.

Azim-ud-din v. *King-Emperor*, 7 L.B.R. 68; *Subrahmania Ayyar* v. *King-Emperor*, I.L.R. 25 Mad. 61 (P.C.), referred to.

Soorma for the appellant. The appellant should not have been tried jointly with the other accused who has been acquitted. The evidence against each other is mutually exclusive. See *Azim-ud-din* v. *King-Emperor* (1). Even on the evidence as it stands it can be shown that the appellant ought to be acquitted. The joint trial has vitiated the conviction.

Tun Byu (Government Advocate) for the Crown. There is no case-law running contrary to the decision in *Azim-ud-din*'s case, and if the trial is held to be

* Criminal Appeal No. 641 of 1939 from the judgment of the Sessions Judge of Thatôn in Sessions Trial No. 6 of 1939.

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vitiated a new trial should be ordered. *Prima facie* it cannot be said that there is no case against the appellant because both the assessors and the Sessions Judge have found the appellant guilty.

DUNKLEY, J.—We have, with reluctance, come to the conclusion that we must order a re-trial of the appellant before another Sessions Judge, owing to the illegality of his original trial.

The appellant was charged before the learned Sessions Judge of Thatôn with having committed the offence of murder by causing the death of a person named Maung Kywe. Without any doubt, Maung Kywe met his death on the night of the 31st January, 1939, by reason of being cut and stabbed with some sharp-edged and sharp-pointed instrument. It was in evidence before the learned Sessions Judge that the first statements that were recorded in the investigation of the offence, which resulted in Maung Kywe's death, led to the suspicion that this offence was committed by a man named Maung Yaung. Subsequently, further investigation elicited that there was evidence also that the appellant, Sar Kee, had committed this offence. The consequence was that the police sent up for trial, in one and the same trial, both Maung Yaung and Maung Sar Kee. Each of them was separately charged with the offence of murder, under section 302 of the Penal Code, by causing the death of Maung Kywe on the night of the 31st January, 1939, and both of them were committed to stand their trial before the Sessions Court on this charge.

The trial before the Sessions Court was a joint trial of the two appellants. The learned Sessions Judge, at the beginning of his judgment, has stated that the case presented difficulties from the outset as the two accused were not charged with having murdered the

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deceased jointly, but there were two sets of conflicting evidence, one to prove that the first accused Maung Yaung was the assailant of the deceased Maung Kywe, and the other to establish the guilt of Sar Kee, the second accused, "for the same offence". With due respect to the learned Sessions Judge, there was no evidence to establish that Sar Kee was guilty of the same offence as Maung Yaung. It was attempted to establish that he was guilty of the murder of Maung Kywe, but that does not make it the same offence as the offence of Maung Yaung, pre-supposing that Maung Yaung had committed this murder.

The trial before the learned Sessions Judge was an illegal trial *ab initio*. The authority for this proposition—an authority which has never been doubted and has, in fact, been followed in several unreported decisions of this Court—is *Azim-ud-din* v. *King-Emperor* (1), and this case was binding upon the learned Sessions Judge and ought to have been followed by him. Had he referred to it, it would have been at once apparent to him that the two accused, Maung Yaung and Maung Sar Kee, could not be tried together. The head-note of *Azim-ud-din*'s case (1) reads as follows :

> "Two persons accused of an offence cannot be tried together if the prosecution cases against them are mutually exclusive. The words 'accused of the same offence' in section 239 of the Code of Criminal Procedure imply that the co-accused have acted in concert or association."

Referring to the provisions of the Criminal Procedure Code, on which this decision is based, section 233 of the Code specifically lays down that for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections

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234, 235, 236 and 239. Consequently, when there is one charge against one person and another charge against another person, these charges must be the subject of separate trials, unless the Code of Criminal Procedure permits that the two charges and, therefore, the two accused may be jointly tried. Section 239 lays down the only circumstances in which accused persons may be jointly tried. Clause (*a*) of this section says :

> " The following persons may be charged and tried together, namely, persons accused of the same offence committed in the course of the same transaction."

When one accused is charged with having murdered a certain person at a certain time and at a certain place, and another accused is charged with having murdered the same person at about the same time and place, and both these accused are being prosecuted because there is evidence against both, but the evidence is of such a character that both of them cannot be convicted, and if one set of evidence is believed one of the accused will have to be convicted, whereas if the other set of evidence is believed the other accused will have to be convicted, it cannot be said that those persons are charged with the same offence committed in the course of the same transaction. " The same offence " means an offence arising out of the same act or series of acts and can mean nothing else. This is clear from the words of the clause " committed in the course of the same transaction." When the prosecution evidence against two persons is mutually exclusive, there is no provision of the Code under which those persons can be tried together; and the joint trial of the two persons is not a mere irregularity which can be cured under section 537 of the Criminal Procedure Code: it is an illegality which goes to the very root of the trial. In the case of

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Subrahmania Ayyar v. *King-Emperor* (1), their Lordships of the Privy Council held that the disregard of an express provision of the law as to the mode of trial was not a mere irregularity such as could be remedied by section 537 of the Criminal Procedure Code, and that such a phrase as "irregularity" is not appropriate to the illegality of trying an accused person for more different offences at the same time, and those offences being spread over a longer period, than by law could have been joined together in one indictment. For myself, I can see no distinction between trying one person on a multiplicity of charges such as is not allowed by law, and trying two persons in one and the same trial where such joint trial is not allowed by law. I am therefore compelled to hold that the trial of this case before the learned Sessions Judge of Thatôn was an illegal trial, and hence there must be a fresh trial of the appellant before some other Sessions Court. * * *

The learned Sessions Judge has, in the course of his judgment, commented on the fact that neither of the accused persons called any defence evidence. The answer is that they were not able to do so because the defence evidence of each was the prosecution evidence against the other, and had therefore been called as prosecution evidence in the case.

It is undesirable that we should express any opinion regarding the evidence against the present appellant or its credibility at this stage, because, as I have already said, it is clearly essential that there should be a re-trial, and therefore we accept this appeal, set aside the conviction and sentence of the appellant, and order the re-trial of the appellant before the Sessions Court of Moulmein on the same charge.

WRIGHT, J.—I agree.

(1) (1901) I.L.R. 25 Mad. 61 (P.C.).