REVISIONAL CRIMINAL.

Before Mr. Justice Nánábhái Haridás and Sir W. Wedderburn, Bart., Justice.

1885. *September 7.*

QUEEN-EMPRESS *v.* RA'MJI SA'JA'BA'RA'O.*

Alternative charge—Contradictory statements—Charge in alternative of two different offences under two different sections of Penal Code—False information to public servant—False evidence—Indian Penal Code (XLV of 1860), *Secs.* 182 *and* 193—*Criminal Procedure Code (Act X of* 1882), *Secs.* 225, 232, 233 *and* 537—*Indian Forest Act VII of* 1878.

The accused was charged, in the alternative, by the trying Magistrate as follows:—

"I, W. W. Drew, Magistrate First Class, hereby charge you, Rámji Sájábáráo, as follows:—That you on or about the 13th day of October, 1882, at Nandarpádá stated that you had seen Vishnu Váman and Máhádu Lakshman carrying teak wood from Gohe Forest, to Náráyan Rámchandra, range forest officer, and on 14th February, 1885, you stated on oath before the First Class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence punishable under section 182 or section 193 of the Indian Penal Code and within my cognizance; and I hereby direct that you, Rámji Sájábáráo, be tried by the said Court on the same charge."

At the trial the accused asserted the truth of the former of these two statements, and denied having made the other. The Magistrate was unable to find which of them was false, and convicted the accused, in the alternative, either under section 182 or section 193 of the Indian Penal Code (XLV of 1860).

Held, that the charge was bad in law, being an alternative charge in a form forbidden by section 233 of the Criminal Procedure Code (X of 1882), which directs that, for every distinct offence of which any person is charged, there shall be a separate charge. Nor could the accused be tried upon a charge framed in the alternative as in the form given in Schedule V-XXVIII-(4) of the Criminal Procedure Code (X of 1882). For, upon the facts alleged, there was no way of charging him with one distinct offence on the ground of self-contradiction. He could not successfully be charged under section 193 of the Penal Code, on contradictory statements, because he only made one deposition, in which there were no discrepancies; and, similarly, he could not be charged under section 182 of the Penal Code, for he only once gave information to a public servant.

Held, also, that, having regard to sections 225, 232 and 537 of the Criminal Procedure Code (X of 1882), the accused, convicted upon such a charge, must be held to have been misled in his defence, and his conviction and sentence reversed.

In charges founded upon supposed contradictory statements every presumption in favour of the possible reconciliation of the statements must be made.

Under section 172 of the Indian Forest Act, VII of 1878, a forest officer is a public servant within the meaning of the Indian Penal Code. Any false inform-

* Criminal Reference, No. 46 of 1885.

ation given to him with the intent mentioned in section 182 of the Indian Penal Code is punishable under that section, whether that information is volunteered by the informant, or is given in answer to questions put to him by that officer.

THIS was a reference under section 438 of the Code of Criminal Procedure (Act X of 1882) by H. J. Parsons, Sessions Judge of Thána, for the orders of the High Court. He said: "In this case the Magistrate (First Class), Mr. Drew, has convicted the accused, in the alternative, either of giving false information to the range forest officer of Pen (section 182 of the Indian Penal Code,) or of giving false evidence to the First Class Magistrate of Pen (section 193.) It appears to me that the conviction is illegal, inasmuch as the information was not given,—that is, was not volunteered to the forest officer,—but was elicited by him in the course of an inquiry, which inquiry, so far as appears from the records, the forest officer was not competent to hold—not being shown to be invested with powers under section **71** (*d*) of the Indian Forest Act, VII of 1878."

On the 30th of June, 1885, there being no appearance on either side, the High Court made the following order:—

"Under section 72 of the Forest Act, VII of 1878, the forest officer is a public servant within the meaning of the Indian Penal Code. Any false information given to him with the intent mentioned in section 182 of the Code is punishable under that section, whether that information is volunteered by the informant, or given in answer to questions put to him by that officer. The Court, therefore, does not think that the ground upon which the Session Judge asks the conviction in this case to be reversed, is a good ground, but upon looking into the case it appears that the Magistrate has adopted a practice the propriety of which requires to be considered. He has apparently, in contravention of section 233 of the Criminal Procedure Code (X of 1882), joined together, in the alternative, two charges under circumstances which do not come under sections 234, 235, 236, or 239. Whether, regard being had to section 72 of the Indian Penal Code (XLV of 1860), this can be done, is a question upon which we should like to hear argument before deciding it."

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Shámráv Vithál, as *amicus curiæ*, for the accused.—The principal rule on the subject of the joinder of charges is contained in section 233 of the Criminal Procedure Code (X of 1882). That rule is, 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 certain cases. In Schedule V, chap. XXVIII-(4), a form is given under this section for alternative charges. Section 233 and the form given in this Code correspond with section 452 of the old Code (Act X of 1872), and the form given in Schedule III. The case of *Queen* v. *Mahomed Hoomayoon Shaw*(1) turns upon the latter section. Accepting this decision to be good law, it cannot be carried further than this, that a conviction under section 193 of the Indian Penal Code (XLV to 1860) would be good if founded upon two absolutely contradictory statements in a judicial proceeding. The conviction would not be good if the charges were under different sections of the Penal Code, or the statements were not self-contradictory. The judgments of Couch, C.J., and other Judges show this to be the case. In the present case one charge is under section 182 and another under section 192; and, therefore, where the Magistrate is unable to determine which is false, there cannot be a conviction. Section 72 of the Indian Penal Code (XLV of 1860) should be read with section 367 of the Criminal Procedure Code (X of 1882). These show that the facts must be distinctly found. The accused is prejudiced in his defence, and his conviction and sentence must be reversed. The provision in section 537 of the Criminal Procedure Code (X of 1882) refers to errors of procedure, not a substantial error of law, as in this case. Moreover, the two statements charged in this case are not absolutely contradictory. Every possible presumption in favour of a reconciliation of the two statements should be made—*Queen-Empress* v. *Ghulet*(2).

V. N. Mandlik, Government Pleader, for the Crown.—In the case last cited, the Allahabad High Court has held that, in a charge under section 193 of the Indian Penal Code (XLV of 1860), it is not necessary to allege which of two contradictory statements is false, but it is sufficient to warrant a conviction of the offence

(1) 13 Beng. L. R., 324. (2) I. L. R., 7 All., 44.

of giving false evidence to show that an accused person has made one statement upon oath at one time and a directly contradictory statement at another. Under section 367 of Act X of 1882, corresponding with section 461 of Act X of 1872 and section 381 of Act XXV of 1861, it is provided that the Court shall pass judgment in the alternative when it is doubtful under which of two sections of the Penal Code the offence of the accused falls.

[NÁNÁBHÁI HARIDÁS, J.—That assumes that the facts constituting the offence must first be definitely found. In this case the Magistrate is unable to find which of the two statements charged is false.]

The Code expressly provides a form for alternative charges in the schedule,—see Schedule V-XXVIII-(4); and in section 367 provides for judgment being passed in the alternative. If a charge is good to try a man on it follows of necessity, that it must be a good charge on which to convict him—*Queen* v. *Mahomed Hoomayoon Shaw*[1]. Section 537 of the Code of Criminal Procedure (X of 1882) forbids the Court to reverse the judgment of a competent Court on the ground of an error or irregularity in the charge.

WEDDERBURN, J.—In this case the accused was tried and convicted by Mr. Drew, a First Class Magistrate, upon a charge which was worded as follows:—"I, W. W. Drew, hereby charge you, Rámji Sajábáráo, as follows:—That you on or about the 13th day of October, 1882, at Nandarpádá stated that you had seen Vishnu Váman and Mahádu Lakshman carrying teakwood from Gohe Forest, to Nárâyan Rámchandra, range forest officer, and on 14th July, 1885, you stated on oath before the First Class Magistrate at Pen, at the trial of these persons, that you did not see where they had brought the wood from, and thereby committed an offence punishable under section 182 or 193 of the Indian Penal Code (XLV of 1860), and within my cognizance; and I hereby direct that you, Rámji Sajábáráo, be tried by the said Court on the said charge." The case was reserved in order to consider whether upon an alternative charge so framed the accused could legally be tried and convicted. Mr. Shámráv

(1) 13 Beng. L. R., 336.

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Vithal, as *amicus curiæ*, was heard for the accused, and the Government Pleader appeared in support of the conviction.

The question of alternative charges and of convictions for contradictory statements is fully discussed in the Full Bench decision in the *Queen* v. *Mahomed Hoomayoon Shaw*[1], when it was held by a majority of the Court that a conviction upon a charge in the precise form given in Schedule III (now Schedule V) of the Criminal Procedure Code (X of 1882) was good. At first sight this might appear to be a decision in favour of alternative charges, but an examination of the judgments recorded shows that the only rule to be followed is that contained in section 233, which directs 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,—the only exceptions being in the cases mentioned in sections 234, 235, 236, and 239, which do not apply to the present case. It is true that the Court decided that a charge could be framed in accordance with the form now marked 28, II, (4), Schedule III, and this form is termed an "alternative" charge both in the marginal note of the schedule and in the head note of the reported case. But it seems also clear that the Calcutta Court did not consider that this charge was really an alternative one, or that it formed an exception to the rule laid down in section 233. Upon this point, Couch, C. J., observes (see page 354) that "it is material to notice that the charge does not allege that the statement made on the 23rd of January, 1873, was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February, 1873, was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true." The accused was, in fact, charged by the schedule form with only one distinct offence as contemplated in section 233, the proof of the offence depending upon the logical conclusion that, if he makes two contradictory and irreconcilable statements, he cannot have done so without making a false statement. The prosecution might have charged

[1] 13 Beng. L. R., 324.

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the accused with giving false evidence before the Magistrate in January, and giving false evidence before the Sessions Court in February, and might have undertaken to prove either or both of these heads of charge. "But (to use the words of Morris and Birch, JJ.), this course was not followed; the simpler course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, when taken in combination, disclosed the specific offence of intentionally giving false evidence."

Applying the above conclusions to the present case, it appears that the charge, as framed, is not in accordance with the requirements of section 233. Nor could it be so modified as to be brought into the shape of the schedule form. For, upon the facts alleged, there is no way of charging the accused with *one distinct offence* on the ground of self-contradiction. He cannot successfully be charged under section 193 of the Indian Penal Code (XLV of 1860) on contradictory statements, because he only gave one deposition in which there are no discrepancies; and, similarly, he cannot be charged under section 182, for he only once gave information to a public servant. Accordingly we are of opinion that the charge is bad in law, being an alternative charge in a form forbidden by section 233 of the Code.

The next question is, whether, looking to sections 225, 232, and 537 of the Criminal Procedure Code (X of 1882), it should be held that the accused was "misled in his defence" by the above error in the charge? It appears to us that he was. For, if the charge had been properly framed, he would have been called upon to plead under two heads of charge, as shown in illustration (*f*), section 235 of the Criminal Procedure Code (X of 1882)—one under section 182 of the Indian Penal Code (XLV of 1860), and one under section 193. He would then naturally have pleaded not guilty to both, and the prosecution would have failed, not being able to prove which view of the facts is the true one. Owing to the erroneous form of the charge, the accused was "entangled in a logical snare," to use the phrase of Mr. Justice Jackson in the case above referred to. In his dilemma he naturally chose the lesser evil, and admitted, (*vide* his examination, exhibit 4,), that the second statement was the true one, thus ren-

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dering himself liable to a sentence of six months' imprisonment under section 182 of the Indian Penal Code (XLV of 1860), in preference to one of seven years under section 193. Under these circumstances we think it must be held that he was misled in his defence; and as, (*vide* section 232 of the Criminal Procedure Code (X of 1882)), it appears that the facts of the case are such that no valid charge could be preferred against the accused in respect of the fact proved, the conviction and sentence must be reversed. Also, looking to the merits of this particular case, it appears that, even if a "contradiction charge" could have been framed, the two statements made by the accused are not such as could have justified a conviction. The first statement to the forest officer is as follows, according to the translation furnished by the Court translator:—"Two men, Vishnu Mokáshi and Mahádu Kalan, were coming from the forest of Gohe, each carrying a teak rafter on his head." The second statement before the Magistrate was that the accused "did not see where they had brought the wood from." But these two statements are not irreconcilable, for the accused may have seen the two men coming from the forest of Gohe and carrying rafters on their heads, but it does not follow that he also saw them at the time when they first put the rafters on their heads and set out from the original place of deposit. Seeing the two men carrying wood on the road from Gohe forest is quite compatible with total ignorance regarding the place from which the wood was brought. With reference to this view of the case, the attention of the Magistrate should be drawn to the case of the *Queen* v. *Bidu Noshyo* [1], in which the principle was laid down that, in charges founded upon supposed contradictory statements, every presumption in favour of the possible reconciliation of the statements must be made.

Conviction and sentence reversed.

[1] 13 Beng. L.R., 325.