1905.

TOWN MUNICIPALITY OF JAMBUSAR v. GIRJASHANKER.

But we cannot help noticing that what the lower appellate Court took as a sign of the want of reasonable and probable cause was a mistake—if mistake it was—on a difficult question of law which the first Court in a careful judgment held to be no mistake.

And in this connection the latest pronouncement of the Privy Council is important, where it was laid down by Lord Davey in delivering the judgment in *Cox* v. *English, Scottish, and Australian Bank*, (1) that, "The plaintiff has also to prove that there was a want of reasonable and probable cause for the prosecution, or (as it may be otherwise stated) that the circumstances of the case were such as to be, in the eyes of the judge, inconsistent with the existence of reasonable and probable cause." We doubt whether this was observed by the Judge of the lower appellate Court.

But apart from this the decree of the lower appellate Court against defendants Nos. 1, 4 and 5 must be reversed and that of the first Court restored with costs throughout.

Decree reversed.

G. P. R.

(1) [1905] A. C. 168 at p. 171.

CRIMINAL REVISION.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR *v.* DATTO HANMANT SHAHAPURKAR.*

1905.
July 19.

Criminal Procedure Code (Act V of 1898), sections 222, 239—Successive breaches of trust—Joinder of charges—Joint trial—Same transaction—'Transaction' meaning of.

Where the accused persons were jointly in charge of trust funds, so that one could not act without the connivance of the other, and each of them misappropriated sums of money from the trust funds to his own use, thus evidently carrying through their object in concert, the fact that they carried out their scheme by successive acts done at intervals, alternately taking the benefits, did not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last: and there was no objection to their being tried jointly at one trial.

* Criminal Application for Revision No. 77 of 1905.

1905.

EMPEROR v. DATTO HANMANT SHAHAPURKAR.

Section 222 of the Criminal Procedure Code (Act V of 1898) clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. The section does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification: it does not prohibit enumeration of the particular items in the charge.

Section 239 of the Criminal Procedure Code (Act V of 1898) admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test.

In section 239 of the Code, a series of acts separated by intervals of time are not excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal, this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible.

The foundation for the procedure in section 239 is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done then that would be outside the provisions of the section.

"Transaction" means "carrying through" and suggests not necessarily proximity in time—so much as continuity of action and purpose.

APPLICATION under section 435 of the Criminal Procedure Code (Act V 1898), for revision of conviction and sentence passed on appeal by A. Lucas, Sessions Judge of Sátára, confirming conviction and sentence recorded by J. E. Sahasrabudhe, First Class Magistrate of Sátára.

The accused No. 1 (Datto Hanmant) was the Karbhari and the accused No. 2 (Ganesh Waman Bhagwat) was the *nagdi* karkun (cashier) of the complainant, Sardar Gangadhar Luxaman Swami of Chafal.

On the 18th April 1898, the complainant left Chafal to go to the Nizam's dominions on business in connection with the regrant of a village. Previous to his departure, the complainant counted his "khasgi" or private balance and handed it over to the two accused.

1905.

EMPEROR v. DATTO HANMANT SHAHAPURKAR.

The complainant did not again verify his cash balance till the 9th June 1903, when he found, on examining the accounts, that Rs. 5,249 remained to be accounted for. He, therefore, charged the two accused with having embezzled that amount. As the alleged embezzlements might have extended over more than five years during which the accused had unchecked control over the Swami's cash, the accused were charged each with having embezzled three items within the period of one year beginning from the 18th April 1898.

Datto Hanmant (accused No. 1) was charged with having misappropriated Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899. And Ganesh Waman was said to have embezzled Rs. 400 on the 21st August 1898, Rs. 400 on the 22nd December 1898, and Rs. 200 on the 17th July 1899.

They were tried together at one trial by the First Class Magistrate of Sátára, who convicted them of offences under section 408 of the Indian Penal Code and ordered that "each of the two accused should suffer rigorous imprisonment for four months for each head of the charge and should also pay a fine of Rs. 300. The sentences to run one after the other."

On appeal the Sessions Judge of Sátára confirmed the convictions, with the exception that the accused No. 2 was not held answerable for Rs. 200, as the item could not be included in the charge, having "been embezzled more than a year after 18th April 1898." The sentences passed on the two accused were confirmed.

Datto Hanmant (accused No. 1) filed this application, contending *inter alia* that the joint trial of the two accused was illegal, that as each of the accused was charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other, the trial was illegal and had prejudiced the defence; and that it was not alleged by the prosecution that either of the accused was any way concerned with the criminal breach of trust by the other in respect of three distinct sums respectively shown in the charges framed against them.

1905.

EMPEROR v. DATTO HANMANT SHAHAPURKAR.

Robertson (with him *M. V. Bhat*), for the accused:—We submit that the various offences with which the accused is charged exceed three in number and they were not committed within one year. These offences cannot therefore be tried together. See section 234 of the Criminal Procedure Code (Act V of 1898). Secondly we say that the offences with which the accused (applicant) is charged are totally distinct offences from those with which Ganesh (accused No. 2) has been charged; and that, therefore, the two accused persons cannot be tried together at one trial. See section 239 of the Criminal Procedure Code (Act V of 1898). A joint trial of two or more persons is permissible only if they are accused of the same offence or of different offences committed in the same transaction or of having abetted one another in committing an offence. The question in the present case is, were the different acts done by the accused so connected together as to form parts of the same transaction. We submit that there was no joint action on the part of the accused; each acted independently of the other. In framing the charges also each of the accused is charged with having committed three distinct acts of misappropriation in respect of three separate sums on three different occasions quite independent of each other. Neither was in any way privy to or connected with the acts committed by the other. The joint trial was, therefore, illegal. See *Emperor* v. *Jethalal Hurlochand* [1], where the remarks on which we rely are at page 465. In this case there is no evidence of preconcert between the two accused.

Binning (with him *D. A. Khare*), for the complainant:—As to the first point we submit that section 222 of the Criminal Procedure Code (Act V of 1898) admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. It enacts that it is sufficient to show the aggregate offence without specifying details. On the second point we submit that the case for the prosecution is that both the accused were acting in concert and had a common intention. In this case both the accused are found to be jointly in charge of the trust fund, so that one could not have acted without the connivance of the other.

Vasudev J. Kirtikar, Government Pleader, for the Crown.

[1] (1905) 29 Bom. 449; 7 Bom. L. R. 527.

1905.

EMPEROR v. DATTO HANMANT SHAHAPURKAR.

BATTY, J.—In this case the two accused Datto Hanmant and Ganesh Waman, having been entrusted with certain moneys belonging to the Swami of Chafal, the first as Karbhari and the second as cashier, were accused of having committed breach of trust in respect of those moneys; Datto, the first accused, having, it is alleged, taken Rs. 650 on the 11th December 1898, Rs. 1,500 on the 12th February 1899, and Rs. 700 at some date unspecified in 1899; while Ganesh Waman is said to have committed breach of trust in respect of Rs. 400 on the 21st August 1898, Rs. 400 on the 21st December 1898 and Rs. 200 on the 17th July 1899.

Both the accused were convicted: each of them in respect of each item which he was alleged to have taken: except that Ganesh was not convicted in respect of the last mentioned item of Rs. 200.

The present application is one for revision in favour of Datto on the ground of misjoinder of charges. Certain facts connected with the grounds assigned for conviction have been stated to us, but in revision we do not ordinarily interfere with findings of fact and in the present case see no reason for departing from the ordinary practice.

The objections taken are, first that the various offences exceed three in number and were not all committed within one year, and that therefore the offences could not be tried together; secondly that the offences with which Datto has been charged are totally distinct offences from those with which Ganesh has been charged and that therefore the two accused persons could not be tried together under section 239 of the Criminal Procedure Code.

We think with reference to the first objection that section 222 clearly admits of the trial of any number of acts of breach of trust committed within the year as amounting only to one offence. Section 222 does not require any particular formulation of the accusation, but only enacts that it is sufficient to show the aggregate offence without specifying the details. It dispenses with the necessity of amplification: it does not prohibit enumeration of the particular items in the charge. In this instance the objection to the charge is practically that it is more specific than it need have been, that it gave more details than are required under that section. This objection amounts, at most, to this that

1905.

EMPEROR v. DATTO HANMANT SHAHAPUR-KAR.

there has been—a merely formal error in the drafting of the charge—an error in the form of the charge which certainly could not have prejudiced the accused and is one which may be dealt with as coming within section 537. The introduction of greater detail than is legally necessary in no way affects the jurisdiction of the Court. Taken by themselves, the charges against Datto and Ganesh may, therefore, respectively be regarded as one offence against each.

The only objection to the trial that remains for consideration is, whether these offences according to the accusation were offences committed in the same transaction. Section 239 admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction, within the meaning of section 239. It is not necessary that the charge should contain the statement as to the transaction being one and the same. It is the tenour of the accusation and not the wording of the charge that must be considered as the test. And in this case, it is for the appellant to show that no such connection between the offences alleged against the two accused was set forth as would satisfy the condition required for a joint trial.

We think that the argument of the learned Counsel for the appellant would have been more convincing if no continuity of action and purpose, common to both the accused throughout, had been alleged in the case presented by the prosecution. The word "transaction" is unfortunately not defined in the Code and the meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations.

According to its etymological and dictionary meaning the word "transaction" means "carrying through" and suggests, we think, not necessarily proximity in time—so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations where the phrase used is "in the course of the same transaction." In section 215, the phrase is used in a connection which implies that there may be a series of acts —illustration (*f*) to that section indicates that the successive acts

may be separated by an interval of time and that the essential is the progressive action, all pointing to the same object. In section 239, therefore, a series of acts separated by intervals of time are not, we think, excluded, provided that those jointly tried have throughout been directed to one and the same objective. If the accused started together for the same goal this suffices to justify the joint trial, even if incidentally, one of those jointly tried has done an act for which the other may not be responsible (*vide* section 239, illustration (*b*)).

We think the foundation for the procedure in that section is the association of two persons concurring from start to finish to attain the same end. No doubt if it were attempted to associate in the trial a person who had no connection whatever with the transaction at a time when one or more of the series of the acts alleged had been done, then it might be urged that would be outside the provisions of the section. But since in this case two persons have associated for the carrying out of one particular common object, *viz.* a breach of trust, the continuance of that object and the progressive execution of it by successive acts seem to satisfy the test and criterion implied in section 239. In this case it has apparently been found by the lower Court that the accused were jointly in charge of the trust fund, one of the accused being the Karbhari and the other cashier. The one could not act without the connivance of the other: and they both evidently carried through their object in concert. That they carried out their scheme by successive acts done at intervals, alternately taking the benefits, does not prevent the unity of the project from constituting the series of acts one transaction, *i.e.*, the carrying through of the same object which both had from the first act to the last. The objections raised are insufficient.

We accordingly reject the application.

Application rejected.

R. R.