It seems to me, therefore, on both these grounds that this application is open to consideration by this Court.

Rule made absolute.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

EMPEROR *v.* JIVRAM DANKARJI.*

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July 29.

Criminal Procedure Code (Act V of 1898), section 403—Previous acquittal—Subsequent trial how far barred—Penal Code (Act XLV of 1860), sections 467, 109, 471.

The accused was tried before a Court of Session for abetment of forgery in relation to a document under sections 467 and 109 of the Indian Penal Code; and was acquitted. He was again tried before the Court of Session for using as genuine the same forged document, under section 471 of the Indian Penal Code. It was objected that the previous acquittal was a bar to the second trial under section 403 of the Criminal Procedure Code :—

Held, overruling the contention, that sub-section 1 of section 403 of the Criminal Procedure Code did not apply to the case, inasmuch as the case was not one contemplated by section 236, that is to say, a case where, upon the facts proved, it was doubtful what should be the true view of the offence constituted.

Held, further, that the case fell under sub-clause (2) of section 403, for the series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial.

Held, also, that the case fell under sub-section 4 of section 403, because the Court which acquitted the prisoner on the charge of abetment of forgery was not competent to try the offence under section 471 of the Indian Penal Code, inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Criminal Procedure Code.

* Criminal Appeal No. 226 of 1915.

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EMPEROR v. JIVRAM DANKARJI.

APPEAL from conviction and sentence passed by C. N. Mehta, Additional Sessions Judge at Ahmedabad.

On a complaint filed on the 25th April 1911, the accused was tried by the Additional Sessions Judge of Ahmedabad for abetting the forgery of two promissory notes, under sections 467 and 109 of the Indian Penal Code. The trial ended in the acquittal of the accused on the 5th February 1912.

In the meanwhile, on the 29th April 1911, the accused produced one of the promissory notes in a suit (No. 187 of 1911) filed by him in the Court of the Subordinate Judge at Umreth. The suit went against the accused. The Subordinate Judge granted a sanction to prosecute the accused for having produced the forged promissory note.

The accused was accordingly tried by the Additional Sessions Judge of Ahmedabad for using a forged promissory note as genuine knowing it to have been forged under section 471 of the Indian Penal Code.

It was objected at the trial that the second trial was bad under the provisions of section 403 of the Criminal Procedure Code, on account of the acquittal in the first case. The objection was, however, overruled, the accused was convicted of the offence charged, and sentenced to suffer simple imprisonment for six months.

The accused appealed to the High Court.

T. R. Desai for the appellant:—I submit that the second trial is bad as having been contrary to the provisions of section 403 of the Criminal Procedure Code. Civil Suit No. 187 of 1911 was decided before the first trial began. It was perfectly competent to the Sessions Court to charge the accused at that trial in the alternative under section 471 of the Indian Penal Code. The accused having been acquitted at that trial, could

not, on the same facts, be tried again for another offence disclosed by the same set of facts. There was no new evidence at the second trial. The case falls under clause I of section 403 of the Criminal Procedure Code as the offence under section 471 is cognate to that under section 467 of the Indian Penal Code. The case falls under sub-section 2 of section 403 of the Criminal Procedure Code, for the offences under sections 467 and 471 of the Indian Penal Code though separable are not distinct offences under section 235, clause (1) of the Criminal Procedure Code : see *Queen-Empress* v. *Umrao Lal*[1]. It is quite true that at the first trial, no sanction has yet issued against the accused for the offence punishable under section 471 of the Indian Penal Code ; but the defect, if any, could have been cured by the provisions of section 537 of the Criminal Procedure Code : see *Perumalla Nayudu* v. *Emperor*[2] ; see also *Queen-Empress* v. *Erramreddi*[3] ; *King-Emperor* v. *Krishna Ayyar*[4] ; *Kaptan* v. *Smith*[5] ; and *Sharbekhan Gohain* v. *Emperor*[6].

S. S. Patkar, Government Pleader, for the Crown.—The provisions of section 403 of the Criminal Procedure Code are no bar to the second trial. The case falls under sub-section 4 of the section. No conviction could be had for an offence under section 471 of the Indian Penal Code as there was no sanction granted. The trial for an offence under section 471 in absence of sanction is bad in law. See *In re Samsudin*.[7]

BATCHELOR, J.:—This is an appeal from a conviction and sentence passed by the learned Additional Sessions Judge of Ahmedabad. The appellant has been convicted under section 471 of the Indian Penal Code of using

(1) (1900) 23 All. 84.
(2) (1907) 31 Mad. 80.
(3) (1885) 8 Mad. 296.
(4) (1901) 24 Mad. 641.
(5) (1871) 16 W. R. 3 (Cri. Rul.)
(6) (1905) 10 C. W. N. 518.
(7) (1896) 22 Bom. 711.

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as genuine a forged document. He was previously tried before the Court of Session in Ahmedabad under sections 467 and 109, that is to say, on a charge of abetment of forgery in relation to the same document, Exhibit 4, in respect of which he is now charged under section 471, and on the charges under sections 467 and 109 the appellant was acquitted by the Court of Session.

The first point taken in the appellant's favour is that this previous acquittal was a bar to the present trial under section 403 of the Criminal Procedure Code. The contention is that the appellant's case falls under the first sub-section of section 403. That sub-section provides that a person once acquitted shall not be liable to be tried again on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. Now, sections 236 and 237 contemplate the case where it is doubtful, upon the facts, which can be proved, which of several offences will be constituted by those facts. In illustration (*a*) is put the case where a person is accused of an act which, upon the facts provable, may amount to theft, or to receiving stolen property, or to criminal breach of trust, or to cheating. Section 237 merely carries on the procedure applicable to cases provided for by section 236. It appears to me that the facts of the present appeal are wholly outside the scope of section 236. For, upon the facts which were capable of proof at the earlier trial, it could never, at any moment, have formed the subject of doubt what the particular offence was which could be established against the prisoner. The only facts appearing in proof at that trial were facts which went to establish the abetment of forgery; that offence, and no other, was the offence constituted by the facts then capable of proof. In the present prosecution, upon certain added

facts, the evidence led goes to show that the prisoner committed the offence of dishonestly using a forged document, knowing that it was forged, and there can be no doubt but that if this evidence is believed, that is the particular offence constituted by the facts which can now be proved. We have not, therefore, before us such a case as section 236 contemplates, that is to say, a case where, upon the facts proved, it was doubtful what should be the true view of the offence constituted. It follows that the case is not governed by sub-section (1) of section 403.

In my opinion the case falls under section 235, sub-section (1) of the Code, and if that is so, then admittedly under sub-section (2) of section 403 the accused's plea is unsustainable by virtue of the provisions of sub-section (2) of section 403. The series of acts beginning with forgery and ending with the user of the forged document in the Civil Court to support the civil claim must, I think, be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under section 235 (1) it would have been competent to try the accused for both offences at the same trial. And I have no doubt that these two offences would be distinct offences within the meaning of section 403 (2), and not merely separable offences, as that term is explained in section 35 of the Code.

Moreover, it appears to me that the appellant's plea is bad for another reason, namely, because the case falls also under sub-section 4 of section 403. For, the Court which acquitted the prisoner on the charge of the abetment of forgery was, in my opinion, not competent to try the present offence under section 471, inasmuch as at the time of the earlier trial no sanction for the prosecution under section 471 had been given under section 195 of the Code. But section 195 (*c*)

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provides that in such a case as this, "no Court shall take cognizance" of any offence punishable under section 471 of the Indian Penal Code "except with the previous sanction" of the Court in which the document was produced; in other words, as I understand it, the grant of such a sanction is a condition precedent to the Court's jurisdiction to try the offence under section 471, so that without that sanction the Court is not competent to undertake the prosecution. This view is, I think, supported by the decision in *In re Samsudin*, [1] and though that ruling was delivered under the Code of 1882, the section of the old Code was worded in substantially the same terms as those employed in our present section 537. It was objected by Mr. Desai that section 537, clause (*b*), shows that a prosecution, though undertaken without the sanction prescribed by section 195, cannot be said to have been undertaken without jurisdiction. That, however, in my view, is not a legitimate inference from the section, which aims only at curing certain irregularities of procedure and to that end enacts that, "subject to the provisions hereinbefore contained," no finding is to be reversed by reason of the want of any sanction required by section 195. The very utmost that could be made of this provision would be an argument relevant only if the trial of the offence under section 471 had proceeded without a sanction and had resulted in a conviction. It might then have been contended, and contended against the appellant's interests, that the conviction was valid notwithstanding the want of the sanction. I say nothing of the merits of such an argument because in truth, we have nothing now to do with any consideration of this sort. It is enough to say that, since there has been no conviction under section 471 without a sanction those facts do not exist which alone can call

(1) (1896) 22 Bom. 711.

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section 537 (*b*) into operation. For these reasons I hold that the present plea is excluded by sub-section (4) of section 403.

On the merits, there can, I think, be no question but that the learned Judge below is right and that the appellant had knowledge that this document was a forged document and used it dishonestly.

As to the question of sentence, it is true that the appellant is an old man and that he has been subjected to two criminal trials. At the same time his offence is in itself a serious one, and he has had a specially light sentence awarded to him, no doubt on a due consideration of these circumstances in his favour which I have noticed.

I think, therefore, that the sentence cannot be reduced, but that the conviction and sentence should be confirmed.

HAYWARD, J. :—I concur as to the question of law. The first trial was for abetment of forgery and failed as the forgery was not proved to have been by the particular co-accused forger. The second trial was for knowingly using the forged document in a civil Court.

It seems to me that no doubt could have arisen in the first trial as to the offence constituted by the facts which could have been proved so as to have justified an alternative charge or conviction under section 236 or 237 of the Criminal Procedure Code. It was not a case like the illustration (*a*) to the former section where the facts provable might have established either theft or receiving stolen property and where the necessary additional facts were not present to render possible a determination definitely whether the offence of theft or of receiving stolen property had been committed. The facts provable in the first trial might have established

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that the accused had abetted the forgery by the particular co-accused forger. But they could not have established any other offence. It was not then alleged that he had used the forged document in the civil Court. The facts were not the same in the two trials and recourse could not, therefore, in my opinion, be had to sub-section (1) of section 403 of the Criminal Procedure Code.

It seems to me that the abetment of the forgery was one offence and the using of the forged document in a civil Court another and distinct offence committed in the same transaction, viz., the endeavour to recover by forgery the money claimed through the civil Court. The matter, therefore, fell within the first sub-section of section 235. The accused was only charged with abetment of forgery at the first trial, though he might, no doubt, apart from the necessity of previous sanction, have been charged with both offences, viz., the abetment of forgery and the using of the forged document in the civil Court. He was, therefore, liable to be charged at the second trial with this using of the forged document in the civil Court under sub-section 2 of section 403 of the Criminal Procedure Code.

But it seems to me in any case that the Court at the first trial on the charge of abetment of forgery was not a Court of competent jurisdiction to try the subsequent charge of using the forged document in the civil Court. For, no Court shall take cognizance of such an offence without the previous sanction of such civil Court under section 195. The second trial on the charge of using the forged document in the civil Court was, therefore, legal under the fourth sub-section of section 403 of the Criminal Procedure Code. Nor could the Court at the first trial on the first charge be said, in my opinion, to have been a Court of competent jurisdiction to try the

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second charge of the second trial by reason of the fact that proceeding illegally with that charge would not necessarily have vitiated the trial by virtue of section 537 (*b*) of the Criminal Procedure Code. Such proceeding would, in my opinion, nevertheless, have been illegal, even though the illegality might have been subsequently condoned under certain circumstances under section 537 (*b*) by a superior Court.

I also concur on the question of fact, viz., accused's guilty knowledge, and in the propriety of the sentence.

Conviction and sentence confirmed.

R. R.

CRIMINAL APPELLATE.

Before Mr. Justice Batchelor and Mr. Justice Hayward.

EMPEROR *v.* BECHUR ANOP.[a]

Indian Penal Code (Act XLV of 1860), sections 100, 325—Grievous hurt—Private defence—Plea cannot be set up in cases of deliberate fight.

1915. *August* 16.

The right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them.

APPEAL from convictions and sentences passed by P. J. Taleyarkhan, Sessions Judge of Broach.

The deceased Jiji took away a log of wood belonging to accused No. 2 and threw it into the Holi bon-fire. The accused No. 2 was anxious to reclaim the wood from the fire, but was prevented from doing so by the deceased. A quarrel took place between them; but they were separated and sent away to their houses. The wood though charred was reclaimed from fire and taken to the house of accused No. 2.

[a] Criminal Appeal No. 276 of 1915.