CRIMINAL APPELLATE.

Before Mr. Justice Fawcett and Mr. Justice Coyajee.

1925. July 30.

EMPEROR *v.* MANANT K. MEHTA*.

Criminal Procedure Code (Act V of 1898), sections 234, 235, 439 (6)—Misjoinder of charges—Breach of trust—Falsification of accounts—Indian Penal Code (Act XLV of 1860), sections 408, 477A—Enhancement of sentence—Accused can show cause against conviction—Right unrestricted.

The offences of criminal breach of trust and of falsification of accounts (sections 408 and 477A, Indian Penal Code) are not offences of the same kind, within the meaning of section 234 of the Criminal Procedure Code.

Where three defalcations are committed on three different occasions, the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations or falsifications connected with them, within the meaning of section 235 of the Criminal Procedure Code.

Desirability of amending section 234 of the Criminal Procedure Code emphasized.

An accused person showing cause against the enhancement of his sentence, is entitled under section 439 (6), Criminal Procedure Code, to show that his trial was illegal and his conviction contrary to law, and there is no justification for restricting his rights in this connection by limiting his grounds of objection to those urged in the lower Courts.

THIS was a reference by D. D. Cooper, Additional Sessions Judge at Surat.

The Industrial and Exchange Bank of India of Bombay opened a branch at Surat in 1921. The accused was appointed manager of the Surat Branch on April 6, 1921. He worked as an honorary manager till June 12, 1923, after which date his salary was fixed at Rs. 115 per mensem. The accused, however, did not draw any salary. On August 3, 1923, he was suspended from his office.

On April 29, 1924, the accused was charged with having committed breach of trust as such manager in respect of three sums of money, viz., (1) Rs. 2,149-9-3 on December 1, 1921; (2) Rs. 1,500 on March 11, 1922;

* Criminal Reference No. 29 of 1925.

(3) Rs. 2,400 on October 31, 1922. He was also charged at the same trial with falsification of accounts with reference to the above three amounts.

The trying Magistrate acquitted the accused on charges with respect to item No. 3 for Rs. 2,400. With regard to item No. 1 for Rs. 2,149-9-3, he sentenced the accused under section 408, Indian Penal Code, to one day's simple imprisonment and a fine of Rs. 250 and under section 477A of the Code to a fine of Rs. 200. With regard to item No. 2 for Rs. 1,500 he sentenced the accused under section 408, Indian Penal Code, to one day's simple imprisonment and a fine of Rs. 200 and under section 477A of the Code to a fine of Rs. 150. The two sentences were ordered to run concurrently.

On appeal the Additional Sessions Judge reversed the conviction and sentence for the offence of criminal breach of trust for item No. 1 for Rs. 2,149-9-3 and ordered the fine of Rs. 250 to be refunded. The remaining convictions and sentences were confirmed.

The learned Judge, however, being of opinion that the sentences passed on the accused were inadequate, referred the case to the High Court for enhancement of sentences.

S. S. Patkar, Government Pleader, for the Crown.

Sir Chimanlal Setalvad and *G. N. Thakor*, with *R. J. Thakor*, for the accused.

COYAJEE, J. :—The accused, who, at the material time, was the manager of the Surat Branch of the Industrial and Exchange Bank of India was tried in the Court of the First Class Magistrate at Surat on a charge which alleged as follows :—

"That you, on or about the period of 1st December 1921 to 31st October 1922, being the manager of the Surat Branch of the Industrial and Exchange Bank of India, wilfully and with intent to defraud the Bank, altered the entries

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in certain books of accounts of the Bank and omitted to have certain entries made, and misappropriated the amounts as shown below, viz. :—

		Rs.	a.	p.
On 1st December 1921	...	2,149	9	3
On 11th March 1922	...	1,500	0	0
On 31st October 1922	...	2,400	0	0

and thus committed criminal breach of trust in respect to the said amounts and thereby committed offences punishable under sections 408 and 477A of the Indian Penal Code, and within my cognizance."

The Magistrate convicted him under sections 408 and 477A in respect of the first two items in the charge, and awarded punishment for each of the four offences.

On appeal the Additional Sessions Judge reversed the conviction and sentence for the offence of criminal breach of trust in respect of the first item ; but the rest of the appeal was disallowed. In the opinion of the learned Judge, however, the punishment was grossly inadequate ; he accordingly made a reference to this Court. Notice was then given to the accused to show cause why his sentence should not be enhanced, and it has now come before us for hearing. In showing cause, counsel for the accused contends that his client was charged and tried at one and the same trial for more than three distinct offences which, moreover, were not all of the same kind ; the trial was, therefore, illegal, as being in contravention of the provisions of section 233, Criminal Procedure Code, and the conviction was contrary to law. This question was not raised at the trial, and the first question is whether the contention is now competent. In my opinion it is. The contention, if made good, vitiates the whole trial.

Section 439 (*6*), Criminal Procedure Code, says :—

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (*2*) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

The language of the enactment is wide, and there is no justification for giving it a restricted meaning.

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The contention, then, is that the charge alleges more than three distinct offences; it is not covered by section 234 of the Code, inasmuch as the offences of criminal breach of trust and of falsification of accounts are not offences of the same kind; and it cannot fall under section 235, because there are three defalcations committed on different occasions, and the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations and falsifications. In my opinion this objection is well founded and must prevail. In *Emperor* v. *Nathalal*[1] the accused was charged at one trial with criminal breach of trust in respect of seventeen sums of money, and also with falsifying accounts with intent to defraud; this Court set aside the conviction and sentence, and directed a new trial on the ground that there was a misjoinder of charges in contravention of section 234. The learned Judges say: "In the present case two offences of distinct character have been joined in the same charge, and the charge under section 477A includes a number of distinct offences in excess of three as provided by section 234." In *Kasi Viswanathan* v. *Emperor*[2], a similar view was expressed, namely, that it is illegal to try a person on a charge which alleges three distinct acts of criminal breach of trust and three distinct acts of falsification of accounts. The authority of this case was followed in *Raman Behari Das* v. *Emperor*[3] where the learned Judge observes:—"It is impossible to take a series of false entries referring to three different defalcations in the same trial although it might be possible to try three defalcations in one charge, or to try a whole series of falsified accounts in one charge. The two could not be combined in the manner in which they have been combined in this case."

[1] (1902) 4 Bom. L. R. 433. [2] (1907) 30 Mad. 328.
[3] (1913) 41 Cal. 722 at p. 726.

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The learned Government Pleader has sought to justify the trial on the ground that although the offence of criminal breach of trust is not of the same kind as the offence of falsification of accounts, here we have a series of acts so connected together as to form but one transaction; that sections 234 and 235 (*1*) which form exceptions to the general rule affirmed in section 233, are not mutually exclusive; and that therefore section 235 (*1*) must be read with section 234. I am unable to accept this contention. It may be conceded that where a person is charged with committing one act of criminal breach of trust and also with falsifying accounts with a view to conceal that particular defalcation, the two may be said to form part of the same transaction. But the facts in this case are different. They would form at least three separate transactions, and as pointed out in the Madras case above referred to, "there is no provision of the Code which says that all offences committed within one year in the course of three separate transactions may be tried at one trial". Reliance is, however, placed on the decision of this Court in *In re Bal Gangadhar Tilak*[1]. That case, however, is distinguishable. For there, the trial proceeded on three charges, one under section 124A with respect to an article published by the accused on May 12, 1908, and one under section 124A and another under section 153A as to an article published by him on June 9, 1908. The accused was convicted. He thereupon appealed to this Court for leave to appeal to the Privy Council on the ground among others (p. 225):

"That the learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences, not of the same kind and not committed in the same transaction, contrary to the express provisions of section 233 of the Criminal Procedure Code and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal, null and void *ab initio*."

[1] (1908) 33 Bom 221.

The learned Judges held that the charges fell within the scope of section 235 (*1*). They then proceeded to consider whether section 235 (*2*) or section 236 could not be made use of in co-operation with section 234, and observed (p. 238):

"We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that sections 235 (*2*) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year."

It is clear then that the particular question now arising before us did not arise in that case. It is however discussed by this Court in the later case of *Emperor* v. *Lalji Bhanji*[1]. There the accused had committed only one act of criminal breach of trust and the accounts alleged to have been falsified related to that particular act. The learned Judges explained and distinguished the decisions in *Emperor* v. *Nathalal*[2] and *Kasi Viswanathan* v. *Emperor*[3] on that ground.

The learned Government Pleader has also referred us to section 222 (*2*). In this case, however, the charge was in respect of three distinct acts of criminal breach of trust. No charge was framed in accordance with the provisions of that section. Moreover, the section refers only to offences of criminal breach of trust or dishonest misappropriation of money, and has no application to the charge as framed in this case.

For these reasons, I hold that the error has wholly vitiated the trial; we set aside the conviction and sentence and direct a new trial.

FAWCETT, J.:—In this case I agree with my learned brother that the point as to illegality of the trial in which the accused was convicted can be raised under

[1] (1911) 14 Bom. L. R. 306. [2] (1902) 4 Bom. L. R. 433.
[3] (1907) 30 Mad. 328.

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sub-section (6) of section 439, as being "cause against his conviction". Those are very wide words and there is nothing in the sub-section to limit their generality. We are sitting as a Court of revision, and any point that the accused might urge against his conviction either to a Court of Appeal or to a revisional Court is, I think, open to him.

The learned Government Pleader submitted that in any case the embezzlements and falsifications of accounts charged against the accused were part of the same transaction, because the evidence shows that from the very commencement of his employment he had an intention to commit such offences and there was therefore a continuity of purpose linking all the offences charged against him. I think that argument is clearly unsustainable. It was considered in a somewhat similar case by this court in *Emperor* v. *Ramnarayan*[1]. There the accused were charged with preparing false balance sheets of a certain Company for the years 1912 and 1913, and were tried at one trial on both the charges and convicted and sentenced. On appeal it was held that there was a misjoinder of charges, for the preparation of the balance sheets for the years 1912 and 1913 could not be regarded as forming the same transaction within the meaning of section 235 of the Criminal Procedure Code. A similar argument was put before the Court, and Heaton J. on this point says as follows (p. 736):—

"Now here there were jointly tried matters relating to two totally distinct affairs, one being the balance-sheet for the year 1912, the other the balance-sheet for the year 1913. It is said that both of them were prepared in pursuance of a policy of deception, that the Company was really insolvent as early as the year 1910 and that the subsequent balance-sheets were prepared falsely with the deliberate purpose of concealing this practical insolvency; and it is said that because this was so, the preparation of these two balance-sheets for successive years was in reality but one transaction. The word 'transaction' used in the Criminal Procedure Code is not defined. Its meaning has frequently been illustrated by cases which are in the books, but in the long run we have

[1] (1919) 21 Bom. L. R. 732.

to deal with every case that arises on its own facts. Knowing the general idea of the words 'the same transaction,' we have to determine whether these words do or do not apply to the particular facts of a particular case. Here it seems to me that to apply the words 'the same transaction', to these two separate proceedings is to confuse the meaning of these words with the idea of things that are done in pursuance of a conspiracy. From the prosecution point of view it is perfectly correct to say that both these balance-sheets were prepared in pursuance of a conspiracy. One only has to think over the matter a little carefully, however, to see that this idea of a conspiracy covers a very great deal that cannot be included in the idea of 'the same transaction'. If we were to take those words as covering a case of this kind, it would lead us to treat the same acts of misconduct or fraud, however often repeated, as constituting the same transaction, if there was the same general purpose underlying the repeated acts. But something far more definite than that is required, before separate proceedings can be brought within the meaning of the words 'the same transaction'."

I entirely endorse that reasoning. Similarly in a case dealt with by the Madras High Court, *Choragudi Venkatadri* v. *Emperor*[1], it was held that

"Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object."

Therefore that contention in my opinion entirely fails.

In regard to the ruling of this Court in *In re Bal Gangadhar Tilak*[2], I agree with the remarks of my learned brother. The particular case which the Court had to deal with there was one where the same offence fell under two different sections of the Indian Penal Code, and the exact point now before us was not then under consideration. There obviously is a difference between the case of such alternative charges, which do not increase the number of acts underlying the charges, and the present case, where the acts are doubled. The former case is analogous to that dealt with in section 236, which allows any number of alternative charges in respect of a single act or series of acts to be made at

[1] (1910) 33 Mad. 502. [2] (1908) 33 Bom. 221.

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one trial: cf. *Begu* v. *King-Emperor*[1]. Therefore I think there is no sufficient ground for our taking a different view from that taken not only by the Calcutta, Madras and Allahabad High Courts, but also by this Court in *Emperor* v. *Nathalal*[2]. No doubt this view provides rather a trap for Magistrates. In the case of alleged embezzlement, there is generally evidence of falsification of accounts to conceal that embezzlement, and unless the Magistrate knows, or has his attention drawn to, the rulings of the Courts about the illegality of joining three charges of embezzlement with three charges of connected falsification of accounts, he not unnaturally thinks, they can be the subject of one trial (which certainly is convenient) and is very likely to fall into the error that has occurred in this case. If the Magistrate had been aware of the danger and exercised a little more care, he might, I think (at any rate, according to the view adopted in *Raman Behari Das* v. *Emperor*[3]) have legally framed his charge so as to comprise only one offence of criminal breach of trust for the aggregate amount alleged to have been embezzled and one other offence for the entire falsification of the accounts in regard to that embezzlement. It is rather absurd that we now have to hold that the trial is illegal on this objection which was never urged in the trial Court or in the Court of Appeal, and where there is clearly no ground for saying that the accused has been in any way prejudiced. However we have no option, and I agree with my learned brother that the conviction of the accused not only in the Magistrate's Court, but also as modified by the Sessions Judge, must be set aside. Fine, if paid, to be refunded.

We have heard the accused's counsel on the further steps to be taken. He draws our attention to the remarks of Batty J. in *Emperor* v. *Jethalal*[4]. We are

(1) (1925) 6 Lah. 226.
(2) (1902) 4 Bom. L. R. 433.
(3) (1913) 41 Cal. 722.
(4) (1905) 29 Bom. 449 at p. 467.

of opinion, however, that we clearly have power to direct a re-trial under section 439 read with section 423, Criminal Procedure Code, and that, as the accused has chosen to raise this point of illegality, there are no sufficient grounds for holding that he should not suffer the ordinary consequences. We think that this is a case where the Court should direct a re-trial, and we leave it to the prosecution to say exactly on what particular charge or charges the re-trial should take place. But regard must of course be had to the necessity of having one trial either in regard to not more than three alleged offences of criminal breach of trust or one trial as to one alleged offence of criminal breach of trust and the alleged falsification of accounts in regard to that breach of trust.

We wish to add that we think the attention of Government should be drawn to this case, with a view to its being considered whether the Government of India should not be moved to amend the Code, in the form of an illustration to section 234 or otherwise so as to obviate difficulties of the kind that have arisen in the present case. We think that obviously in this case (and probably in all such cases) there is really no prejudice to an accused, if he is allowed to be tried in one trial for three separate offences of criminal breach of trust committed within one year and also three separate but connected offences of falsification of accounts in regard to those breaches of trust. Regrettable delay and expenditure are entailed by the present law, as interpreted by the Courts, which frequently necessitate the upsetting of trials and in consequence either the re-trial of the accused or his getting off scot-free.

A copy of our judgments should be sent to the Local Government accordingly.

Re-trial ordered.

R. R.