CRIMINAL APPELLATE.

Before Mr. Justice Madgavkar and Mr. Justice Baker.

1928
November 6

GOPAL RAGHUNATH *v.* EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 239 (d)—Indian Penal Code (Act XLV of 1860), sections 489-A, 489-B and 489-D—Alternative charges—Joinder of charges—Conspiracy—Separate act done by conspirators in furtherance of conspiracy—Failure to establish conspiracy—Trial not vitiated—Test in such cases.

The accused and two others were charged under sections 489-A, 489-B, and 489-D, read with section 120-B, of the Indian Penal Code with conspiracy to collect and possess materials for counterfeiting currency notes, and with using such notes as genuine. In the alternative they were all charged under section 489-D with having in their possession materials for counterfeiting currency notes. The two other persons were further charged under section 489-A, with having counterfeited currency notes and the accused was charged under section 489-B, with having used as genuine a counterfeit currency note. The trial resulted in the acquittal of the two persons, on all the charges, and in the conviction of the accused for an offence under section 489-B. The accused appealed and contended that his trial jointly with the two other persons was contrary to law.

Held, that the trial of the accused was not vitiated and was covered by section 239(*d*) of the Criminal Procedure Code as no prejudice was shown to the accused and as the act of which the accused was convicted was so connected with the subject-matter of the other charges as to form a single transaction.

Emperor v. *Datto Hanmant Shahapurkar*,[1] followed.

THE accused Gopal and two others, Mhalrasa and Dada, were tried by the Sessions Judge of Nasik under sections 489-A, 489-B, and 489-D, read with section 120 of the Indian Penal Code.

They were charged with conspiracy to collect and possess material for counterfeiting Rs. 100 currency note and with counterfeiting currency notes and using such notes as genuine. In the alternative they were all charged under section 489-D, in that they all between June 1927 and February 1928 at Yeola had in their possession materials for the purposes of being used for counterfeiting currency notes. Accused Nos. 1 and 2

*Criminal Appeal No. 404 of 1928 against the order of conviction and sentence passed by G. C. Shannon, Esquire, Subordinate Judge, Nasik, in Sessions Case No. 15 of 1928.

[1] (1905) 30 Bom. 49.

were further charged under section 489-A with having counterfeited notes of Rs. 100 and accused No. 1 was charged under section 489-B with having used as genuine a counterfeit note of Rs. 100. Accused Nos. 2 and 3 were acquitted of all charges and accused No. 1 was found guilty and convicted under section 489-B and was sentenced to suffer rigorous imprisonment for five years.

Accused No. 1 appealed to the High Court.

H. C. Coyaji, with *D. R. Patwardhan*, for the accused.

P. B. Shingne, Government Pleader, for the Crown.

MADGAVKAR, J. :—This is an appeal by accused No. 1, Gopal, against his conviction, and sentence of five years' rigorous imprisonment under section 489-B, Indian Penal Code, by the Sessions Judge of Nasik. The first point of law raised before us on his behalf is that the joinder of the charge of which he has been convicted, with the other charges, was illegal, and is not covered by section 239 of the Code of Criminal Procedure.

The case for the prosecution was that the appellant, accused No. 1, with two others, accused Nos. 2 and 3, acquitted in the lower Court, were all privy to the counterfeiting and passing of false currency notes, and committed offences under sections 489-A, 489-B, and 489-D of the Indian Penal Code. The committing Magistrate had charged all three of them with offences under these three sections. Before the trial commenced in the Court of Sessions, the learned Sessions Judge elaborated the charges into, first, a conspiracy under these three sections, alternatively with offences in the course of the same transaction under section 489-D. He further charged accused Nos. 1 and 2 with offences under section 489-A, and lastly accused No. 1 alone with an offence under section 489-B. In the

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result, excepting the conviction of the appellant, accused No. 1, on the last charge, the trial resulted in the acquittal of all the accused on all the other charges.

It is argued for the appellant that the joinder was illegal, the offences charged numbering more than three, and in any case they caused serious prejudice to the appellant by letting in evidence which would not have been admissible, had the present charge under appeal, under which alone he was convicted, been tried separately. For the Crown it is contended these charges form part of the same transaction, and are, therefore, covered by section 239, clause (*d*), of the Code of Criminal Procedure, as well as by section 235.

As is often the case with a number of elaborate charges, it is difficult to lay down any single test or criterion. The cases, in my opinion, divide themselves into three. First, a case such as the one in *Subrahmania Ayyar* v. *King-Emperor*,[1] not covered by sections 235 or 239, in which case, prejudice or no prejudice, the illegality entitles the appellant to an acquittal. The second case is where without such illegality, prejudice might nevertheless be caused to the accused so that even though the Crown may have the power of joinder, it might be fairer not to exercise that power. The third class of cases is where there is such a common thread or purpose underlying the alleged offences of the accused, even though separated by time and space, that they form part of the same transaction, and are difficult to present separately, in which case the law permits, and the Crown usually adopts, a joint trial with numerous accused and numerous charges. The question in each particular instance is as to which of these three classes of cases covers the particular case for decision. In the present instance the question turns upon whether

[1] (1901) 25 Mad. 61.

the offence now under appeal is part of the same transaction as the offences in the other charges. The only transaction, if any, is the alleged conspiracy. True, the prosecution in the result failed to prove it, but that of itself does not necessarily make the trial illegal, the test being, not what the prosecution has proved in the end, but what they alleged at the beginning in the charges. On the actual facts of this case it is not clear to me that all these charges were necessary, and, so far as I can judge, it might have been simpler perhaps to have charged all three with conspiracy, and perhaps with abetment in respect of the particular offence which the prosecution sought to prove against the appellant in respect of the counterfeit note found originally on the person of Rajaram. But taking the charges as they are, the case for the prosecution was throughout clear that the three accused were engaged in collecting materials for counterfeiting notes, in counterfeiting them, and in uttering them, and that one of the transactions which was the result of this conspiracy and the common efforts of the three was this particular note, which was passed on to Rajaram. In fact it appears that Rajaram himself was prosecuted separately in respect of this note, but was acquitted. As Rajaram was not alleged to have taken part in the conspiracy, he was rightly not included in the present trial, but was separately tried. The question is whether, although the appellant was alleged to have been one of the conspirators, he was entitled to a separate trial on the last charge, or whether that charge could in law have been joined with the other charges, as it actually was. That question must be answered, whether prejudice has or has not been caused, on a consideration only of the question whether this last act was so connected with the subject matter of the previous charges as to form a single transaction.

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Difficult as the definition of " transaction " is, accepting it as laid down by Batty, J., in *Emperor* v. *Datto Hanmant Shahapurkar*,[1] we are of opinion that this may reasonably be said to be a part of the same transaction in the sense that it was the working, the fruits and the result of the alleged conspiracy, and if so, the separate act done by any of the conspirators in pursuance of that conspiracy could be joined in the same trial. See the remarks of Mookerji, J., in *Amrita Lal Hazra* v. *Emperor*.[2]

Therefore, the contention for the appellant in my opinion fails.

Strictly speaking, it is not, therefore, necessary to enter into the question of prejudice. Nevertheless I agree entirely with the remarks of Birdwood, J., in *Queen-Empress* v. *Fakirapa*[3] that such prejudice is, as far as possible, to be avoided. That a large part of the evidence turned out not very material is possible. But in regard to the main pieces of evidence, I am of opinion that though they might have been more directly relevant to the charge perhaps of preparing counterfeit notes rather than of uttering this particular note, even had this charge been tried by itself, on the question of intention most of that evidence would have been admissible under sections 13 and 14 of the Indian Evidence Act. The fact, for instance, that a genuine note for Rs. 100 bearing the same number as the counterfeit note found on the person of Rajaram, the subject matter of the charge, or that the honeycomb picture, Exhibit H3, was found in the house of the appellant would be admissible. The question whether the note, Z3, found on the person of Shankar and traced to Yeola but not to the appellant, would be admissible is perhaps

[1] (1905) 30 Bom. 49. [2] (1915) 42 Cal. 957.
[3] (1890) 15 Bom. 491.

more doubtful. Taking the evidence as a whole, we are not convinced there has been such serious prejudice to the appellant as to necessitate a re-trial if his guilt is proved. On the question whether his guilt is proved, I agree with the judgment of my learned brother dealing with the material facts of the case. I am of opinion, therefore, that the appeal fails, and must be dismissed, and the conviction and sentence confirmed.

BAKER, J.:—So far as regards the point of law raised by the learned counsel for the appellant, namely, that this accused has been prejudiced by his trial along with accused Nos. 2 and 3 who were originally charged with conspiracy along with him, I am of the same opinion as my learned brother. Under section 239, clause (*d*), Criminal Procedure Code, persons accused of different offences committed in the course of the same transaction may be charged and tried together. The main question would be whether the proceeding with which we are concerned in the present case formed one and the same transaction. Now, the original case for the prosecution was that the accused Nos. 1, 2 and 3 had together entered into a conspiracy for the purpose of forging currency notes and uttering them when so forged. The prosecution failed to establish any conspiracy in this case. There was no evidence against accused Nos. 2 and 3 from which any conspiracy could be held proved, and therefore the charge of conspiracy as regards accused No. 1 failed also, for, as the Judge says, he could not conspire with himself. The question then would arise whether the accused could have been tried along with accused Nos. 2 and 3 on a separate charge for the offence of uttering a forged currency note, with which accused Nos. 2 and 3 had nothing directly to do, except in so far as they might, as conspirators or members of the conspiracy,

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be held to be guilty of that offence under section 120-B. The real question involved in this case is what is meant by the same transaction. The learned counsel for the appellant has referred to several cases in the course of his argument, but these cases are not quite on all fours with the present case. In *Emperor* v. *Datto Hanmant Shahapurkar*[1] we have a definition of the word "transaction" (p. 55): "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," and "'transaction' means 'carrying through' and suggests . . . not necessarily proximity in time—so much as continuity of action and purpose." The case on which the learned counsel has relied, *Queen-Empress* v. *Fakirapa*,[2] is a case of a very extreme character in which four accused persons were all charged with an offence against one person only on one date, against the same person on another date, and various of the accused were charged with offences against other persons on different dates, and they were ultimately all tried together although there were in all seven charges against some or all of the accused relating to seven offences committed against three persons on different dates. It is obvious that the joinder of so many charges relating to different dates and different persons would tend to prejudice the defence of the accused and to cause confusion in the mind of the Court. In *Subrahmania Ayyar* v. *King-Emperor*[3] the accused, who were two in number, were jointly tried for a large number of offences, more than were allowed to be tried

(1) (1905) 30 Bom. 49. (2) (1890) 15 Bom. 491.
(3) (1901) 25 Mad. 61.

together by the provisions of the Code of Criminal Procedure. The appellant, as the Lord Chancellor pointed out, was tried on an indictment in which he was charged with no less than 41 acts extending over a period of two years, and the facts of the present case have no relation to a charge open to such an objection as that. Under section 239, as it stood before amendment, the illustrations show that if A and B are accused of robbery in the course of which A commits a murder with which B has nothing to do, A and B may be tried together on a charge charging both of them with robbery, and A with murder. If the charge of conspiracy has been brought home to accused Nos. 2 and 3, then it would have been open to the Court to charge and convict the present appellant of the offence under section 489-B, viz., uttering a forged note, and the fact that the evidence fell short of bringing home the charge of conspiracy does not, in my opinion, make the joint trial of the accused illegal. So long as the accusation against all the accused persons is that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established would not vitiate the trial as regards those acts for which the evidence was sufficient for proof. The question of prejudice does not really arise in the present case, because we are not here dealing with evidence which would only be relevant in a charge of conspiracy. It would be a different matter if the bulk of the evidence in the case consisted of words spoken by or actions done by accused Nos. 2 and 3 which was sought to be used against accused No. 1. It may be argued that even though his trial was not illegal, prejudice has been caused to him by the joint trial, but that, however, is not the case in the present case.

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[Here the learned Judge dealt at length with the evidence in the case and concluded :—]

In the present case the circumstances are strongly against the innocence of the accused, and I entirely agree with the view which the learned Sessions Judge and two of the Assessors have taken that he is guilty of an offence under section 489-B of the Indian Penal Code. I would, therefore, confirm the conviction and sentence, and dismiss the appeal.

There is, however, one slight alteration which requires to be made. In the final order the learned Sessions Judge has ordered Exhibit A, which is the genuine currency note, to be confiscated and sent to the Collector of Nasik for cancellation. That order, I suppose, is made under section 517. There is, however, no direct evidence that any offence has been committed in respect of this note. Section 517, sub-section (1), of the Criminal Procedure Code, runs :—

" When an inquiry or a trial in any criminal Court is concluded, the Court may make such order as it thinks fit for the disposal by destruction, confiscation, or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody or regarding which any offence appears to have been committed; or which has been used for the commission of any offence."

Most probably the learned Sessions Judge regarded this note as being the original from which counterfeits were prepared, and therefore as having been used for the commission of an offence. I think, on the whole, that this order should be modified by directing the restoration of Exhibit 1A to the accused No. 1, the appellant in the present case.

There also appears to be a mistake in the judgment as regards Articles Z, Z1, Z2, Z5, Z6, Z7, Z8, Z9, Z18 which are ordered to be returned to accused No. 2. These were attached in the house of accused No. 1, and should be returned to him. " Accused No. 2 " appears to be a mistake for " accused No. 1."

The above order regarding the restoration of the property to be carried out by giving it to the father of the appellant, Raghunath Narayan, as the appellant himself will be in jail for a lengthy period.

Appeal dismissed.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Baker.

1928
November 7

SHANKAR MAHADEO JADHAV (ORIGINAL PLAINTIFF), APPELLANT *v.* BHIKAJI RAMCHANDRA GHANEKAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Redemption—Equity of redemption—Sale of fractional interest in equity of redemption—Purchaser buying up mortgagees' rights—Purchaser becomes charge holder with reference to other mortgagors—Subrogation of mortgagees' rights—Transfer of Property Act (IV of 1882), section 95—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 15-D.

B's father originally owned eight annas' share in a Khoti Village, the other eight annas belonging to the family of Jadhav. In 1861 B's father sold half of his share (four annas' share) to the Jadhavs. In 1894 certain five members of the Jadhav family mortgaged the four annas' share to one G. In 1895 B filed a suit for partition and possession of his four annas' share out of the whole village against the Jadhavs and their mortgagees. A decree was passed in B's favour. G appealed, and during the pendency of the appeal in 1897 B purchased the equity of redemption of three of the five original mortgagors. After this there was a compromise between B and the mortgagee G under which on payment of Rs. 1,500 by B, G's rights in the property were sold to him. The terms of compromise were incorporated in a decree. In 1919 the plaintiff, a member of Jadhav family, sued for redemption of the mortgage of 1894 and for accounts under section 15-D of the Dekkhan Agriculturists' Relief Act :—

Held, (1) that B, who had already purchased a portion of the equity of redemption, was not by his purchase of the mortgagee rights subrogated to the position of the mortgagee, but was in the position of a charge holder under section 95 of the Transfer of Property Act, 1882 :

Vasudev v. *Balaji*,[1] *Tangya* v. *Trimbak*,[2] *Rugad Singh* v. *Sat Narain Singh*,[3] referred to;

(2) that the suit for accounts did not lie;

(3) that the plaintiff's remedy was a suit for partition and possession of his share on paying his quota of the redemption money.

*Second Appeal No. 820 of 1925.

(1) (1902) 26 Bom. 500. (2) (1916) 18 Bom. L. R. 700.
(3) (1904) 27 All. 178.