1904 MAY 10.

ORIGINAL CRIMINAL.

31 C. 1050=8 C.W.N. 528= 1 Cr. L. J. 451.

be given to the words "any evidence" in s. 292. I am informed that the same question arose before Mr. Justice Pratt when presiding over a Criminal Session of this Court, and that he decided that the prosecution was entitled to reply.

GEIDT, J. I have seen Mr. Justice Pratt with reference to his decision cited by the Standing Counsel and he has very kindly shown me his note of the case. From that it appears that, in addition to depositions taken before the commiting Magistrate, other documents that did not form any part of the record sent up by the committing Magistrate were put in by the accused during the cross-examination of the witnesses for the prosecution and it was upon that circumstance that his decision was based. This is not the case here. The depositions of witnesses taken before the committing Magistrate and statements of the accused forming part of the record sent up by that Magistrate cannot be said to be evidence adduced by the accused after the case for the prosecution is closed. As the witnesses have been examined in this Court, their depositions, before the commiting Magistrate may, in the discretion of the presiding Judge, be treated as evidence, independently of their being tendered by the accused and I regard the tender as an application that the discretion of the presiding [1052] Judge be exercised in the manner provided by section 288. The record of the statement of the accused, made by the head constable cannot be used by itself as evidence. That is forbidden by section 162 (1) of the Criminal Procedure Code. Properly speaking it could only be used by the Sub-Inspector as a writing from which he refreshed his memory as to what was said by the accused. I am of opinion, therefore, that no evidence has been adduced by the accused in this case, and that the prosecution is not entitled to reply.

---

31 C. 1053 (=8 C. W. N. 715=1 Cr. L. J. 713.)

[1053] APPELLATE CRIMINAL.

Before Mr. Justice Pratt and Mr. Justice Handley.

HIRA LAL THAKUR v. EMPEROR.*

[10th June, 1904.]

Joint trial—Different transactions—New trial—Criminal Procedure Code (Act V of 1893) ss. 235, 239—Indian Penal Code (Act XLV of 1860) ss. $\frac{403}{109}$ *414, 420, 471.*

On the 23rd August 1903 the appellant obtained a payment from the firm of S. R. R. D. of Rs. 5,000 in currency notes of Rs. 500 each on a *hundi* by falsely representing himself to be a durwan to the firm of H. R. R. C. On the 22nd January 1904 the appellant accompanied by S. T. went to a shop and purchased some silk, and in payment S. T. gave a note of Rs. 500, which was one of the notes received by the appellant on the 23rd of August. The appellant and S. T. were tried jointly and convicted,—the appellant under ss. 420, 471 and 403 of the Penal Code with regard to the occurrence of the 23rd August, and S. T. under ss. $\frac{403}{109}$ and 414 of the Penal Code with regard to the occurrence of the 22nd January :—

Held that the joint trial was bad in law, and that a new trial should be held by a different Magistrate.

[Fol. 11 Cr. L. J. 30.=4 I. C. 700=6 M. L. T. 17.]

APPEAL by Hira Lal Thakur.

---

* Criminal Appeal, No. 452 of 1904, against the order passed by Bazlal Karim, 3rd Presidency Magistrate of Calcutta, dated March 22, 1904.

1904
JUNE 10.

APPELLATE CRIMINAL.

31 C. 1053=8 C.W.N. 715= 1 Cr. L. J. 713.

On the 22nd August 1903 one Sobharam, the jemadar of the firm of Hurnuck Rai Ram Chunder, presented a *hundi* valued at Rs. 5,000, for encashment to the firm of Suderam Ram Rikh Dass. On the 23rd August the appellant, Hira Lal Thakury representing himself to be one Saligram, a durwan of the firm of Hurnuck Rai Ram Chunder, applied for payment of the *hundi*. The *hundi* was given to him for endorsement; he took it away [1054] and returned after a short time with the endorsement of Hurnuck Rai Ram Chunder on the back of it. The Rs. 5,000 was then paid to him in ten notes of Rs. 500 each. The fraud was discovered when the real jemadar, Sobharam, came soon afterwards and demanded payment of the money. On the 22nd January 1904 the appellant accompanied by one Surajbhan Thakur went to the firm of Whiteaway, Laidlaw & Co. to purchase some silk. The silk was purchased and Surajbhan Thakur gave, in payment, a note of Rs. 500 which was one of the ten notes received by the appellant from the firm of Suderam Ram Rikh Dass in payment of the *hundi*. The appellant and Surajbhan Thakur were tried in one trial by the Third Presidency Magistrate of Calcutta and convicted;—the appellant under ss. 420, 471 and 403 of the Penal Code with reference to the occurrence of the 23rd August 1903, and Surajbhan Thakur under ss. $\frac{403}{109}$, and 414 of the Penal Code with reference to the occurrence of the 22nd January 1904.

Mr. *Swinhoe* (Babu *Nogendra Nath Mitter* with him), for the appellant. The trial of the appellant jointly with Surajbhan Thakur was illegal. The appellant was charged under ss. 420, 471 and 403 of the Penal Code with reference to what occurred on the 23rd August 1903 when he cashed the *hundi*. The Magistrate has found in his judgment that Surajbhan Thakur was in no way concerned in this transaction, nor has it been suggested that he knew about it. Surajbhan Thakur has been convicted under ss. $\frac{403}{109}$, and under s. 414 of the Penal Code with regard to what took place at Whiteaway, Laidlaw's in January, about five months afterwards. The two persons could only be tried jointly under s. 239 of the Criminal Procedure Code if they were accused of the same offence or of different offences committed in the same transaction or of having abetted one another in committing an offence. In this case the two occurrences are separate and distinct, nor can it be said there was such a continuity of purpose as to make the two occurrences part of the same transaction. The transaction on the 23rd August was complete in itself and totally independent of what occurred in January. The meaning of the words "the same transaction" has [1055] been fully discussed in *Queen-Empress* v. *Fakirapa* (1). It is not alleged in this case that there was any conspiracy between the two accused persons. The two accused could no doubt have been jointly tried with regard to the offences committed by them in January, but that is not the case here. There has been a misjoinder and the trial is bad *ab initio*: *Bishnu Banwar* v. *The Empress* (2), *Gobind Koeri* v. *Emperor* (3). The question as to whether the appellant has been prejudiced or not does not affect this case, as s. 537 of the Criminal Procedure Code does not apply: *Subrahmania Ayyar* v. *King Emperor*(4).

Mr. *Zorab*, for the Crown. The grievance of the appellant is that he should not have been tried jointly with the other accused. The joint trial, I submit, was perfectly legal. The two accused went together to

(1) (1890) I. L. R. 15 Bom. 491.
(2) (1896) 1. C. W. N. 35.
(3) (1902) I. L. R. 29 Cal. 385.
(4) (1901) I. L. R. 25 Mad. 61.

1904
JUNE 10.

APPELLATE CRIMINAL.

31 C. 1053=8 C. W. N. 715=1 Cr. L. J. 713.

cash the notes and they acted in concert. This case is distinguishable from the cases cited by the other side; those were cases of assault, receiving property, etc., in which the offences were distinct; here there was a conspiracy to deal with the notes by the accused. The question here is—Were the different acts done by the accused so connected as to form parts of the same transaction? In order to ascertain this it is necessary to see what the object of the appellant was when he cashed the *hundi*; it was to get possession of money which they could appropriate; the final misappropriation when the note was disposed of was the culminating point in the whole transaction, and was done by both accused in concert; all the previous acts by the appellant were merely ancillary to the final misappropriation. The question of time and place in a case of this description is of no importance; it does not matter that the acts are done at intervals of a few weeks or even months. The appellant could have been tried for all these offences. If that be so, the fact that at the end of the transaction the last of the series of acts was done by Surajbhan Thakur does not render it any the less the same transaction. Further, I would submit that under the circumstances this Court should not interfere as the appellant has not been in any way prejudiced.

[1056] PRATT AND HANDLEY, JJ. The prisoner in this case has been convicted of offences under sections 420, 471 and 403 of the Indian Penal Code. One Surajbhan Thakur was jointly tried with him on charges under section 403 read with 109 and section 414.

The offences of which the appellant was charged were said to have been committed on the 23rd August 1903. The charges against Surajbhan Thakur also mentioned the same date; but in his judgment the Magistrate has stated, and we think quite correctly, that Surajbhan Thakur had nothing to do with what occurred on the 23rd August. Therefore in convicting him with reference to the note of Rs. 500 in Whiteaway, Laidlaw's shop we must take it that the Magistrate found that the offences which Surajbhan Thakur committed took place on the 22nd January 1904, and not on the 23rd August.

We think it is clear that the transaction of the 23rd August was complete in itself and that Surajbhan had nothing to do with it. What occurred on the 22nd January was a fresh transaction in which both the accused were concerned and for which they might have been jointly tried; but as the matter stands we are clearly of opinion that the joint trial was bad in law, because it was not confined to the offence or offences committed on the 22nd January. That being so, we must give effect to the legal objection raised by the learned Counsel for the appellant and set aside his conviction, and direct a new trial. In the meantime the accused will be detained in *hajat* unless he can give very substantial bail to the satisfaction of the Magistrate.

We think under the circumstances the accused should be tried by some Magistrate other than the Third Presidency Magistrate to whom the Chief Presidency Magistrate may transfer the case.

New trial directed.