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APPELLATE CIVIL.

31 C. 707.

[709] MACLEAN, C. J. In this suit the plaintiff claimed the whole 16 annas of the rent. It turned out that, at the most, he was entitled only to a 4 annas share, and a decree has accordingly been given for such share. The defendants appeal.

Their contention is that the plaintiff is not entitled to a decree even for that share. It is argued that the plaintiff sued originally for the whole 16 annas share, but is found entitled only to a 4-anna share of the rent, that his co-sharer landlords are not co-plaintiffs nor defendants, that there is no allegation or proof of any arrangement between the landlords and the tenants that the tenants should pay each co-sharer his proportionate share of the entire rent and that, in the absence of any such arrangement, the suit is not maintainable. This contention is supported by the decision of a Full Bench of this Court, *viz.*, *Guni Mahomed* v. *Moran* (1).

A suit originally of one nature has been converted into a suit of an entirely different nature. As I have pointed out the plaintiff originally claimed 16 annas of the rent. It was found that he was only entitled to 4 annas; but as there was no arrangement between the co-sharers landlords and the tenants as to the payment to each co-sharer of his proportionate share of the rent, I do not see how the suit can be maintained.

In respect to the argument that the question as to the plaintiff's right to receive separately 4 annas of the rent was not put in issue or decided, the answer is that suggested by the learned vakil for the appellant, that the suit being for the whole 16 annas share, it was incumbent on the plaintiff, in the absence of his co-sharers, to show that he was entitled to the entire 16 annas. The suit is not based on the footing of his only being entitled to 4 annas of the rent. I think, therefore, that the suit must fail and be dismissed with costs throughout, the judgment of the Court of Appeal below being reversed.

BODILLY, J. I concur.

STALEY, J. I concur.

Appeal decreed.

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31 C. 710 (=1 Cr. L. J. 797.)

[710] CRIMINAL REVISION.

Before Mr. Justice Pratt and Mr. Justice Handley.

EMPEROR *v.* LUCHMUN SINGH.*

[26th and 27th April, 1904.]

Extortion—Confinement—Abetment—Evidence—Appeal—Court—Misjoinder—Indian Penal Code (Act XLV of 1860) s. 347—Criminal Procedure Code (Act V of 1898), s. 428.

A Head constable in charge of a police outpost agreed to drop proceedings against K, who had been arrested on a certain charge on condition that K paid to him a sum of money. The Head constable sent away K in charge of two chowkidars to procure the money.

In order to effect this object the chowkidars subsequently confined K at various places and maltreated him.

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* Criminal Revision No. 330 of 1904, made against the order passed by W. Teunon, Sessions Judge of Cuttack, dated the 26th of February 1904.

(1) (1878) I. L. R. 4 Cal. 96; 2 C. L. R. 371.

Held, that it would be impossible to hold the Head constable guilty of abetting an offence under s. 347 of the Penal Code in the absence of proof that he gave definite orders to that end.

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Where in an appeal a Sessions Judge is of opinion that the evidence of witnesses, who were not examined in the lower Court, is necessary, he should proceed under s. 428 of the Criminal Procedure Code.

CRIMINAL REVISION.

Where in showing cause against a Rule obtained by a petitioner, an objection as to misjoinder, which formed no portion of the Rule, was taken by the Crown for the first time, the High Court declined to give effect to it.

31 C. 710.
=1 Cr. L. J. 797.

[Dist. 13 Cr. L. J. 457=15 Ind. Cas. 89.]

RULE obtained by the petitioner Luchmun Singh.

This was a Rule, calling upon the District Magistrate of Puri to show cause, why the order of the Sessions Judge directing the retrial of the petitioner, should not be set aside on the grounds :—

(1) that the Sessions Judge had erred in holding that the petitioner could be tried on a charge under s. 347 of the Penal Code with regard to the detention of Krupa Sahu at Ramlunka or elsewhere,

(2) that the facts alleged by the prosecution did not support a charge under s. 347 of the Penal Code,

[711] (3) that having regard to the fact that the charge under s. 213 of the Penal Code rested on the same evidence, retrial of the petitioner on that charge was not proper,

(4) that the prosecution had ample opportunity of examining the three witnesses mentioned in the order of the Sessions Judge and that it was not shown that their evidence was of any importance.

At a late hour on the night of Monday the 13th October 1902 two chowkidars waylaid one Krupa Sahu and arrested him on a charge of illicit possession or manufacture of country liquor. They took their prisoner to the Krishnaproshad outpost, where they arrived on Tuesday morning. There it was arranged that Krupa Sahu should pay Rs. 30 to the petitioner, who was the Head constable in charge of the outpost and that thereupon proceedings against him should be dropped. On Tuesday afternoon the petitioner sent away Krupa Sahu in charge of the two chowkidars to procure the money. The three men spent Tuesday night at Ramlunka and after unsuccessful endeavours on the part of Krupa Sahu to raise the money, they left that village about noon on Wednesday. Later in the day they were seen together at Payagi a village three miles to the south of Ramlunka. It was alleged that Krupa Sahu was ducked in a pond and beaten by the chowkidars. On the morning of Thursday the dead body of Krupa Sahu was discovered suspended from a tree within the precincts of the temple of Aleshwar. The medical evidence disclosed that death had resulted from wounds that could not have been self-inflicted. The petitioner was tried by the District Magistrate of Puri on charges under ss. 213, 347 and 202 of the Penal Code. With him were tried the two chowkidars on charges under ss. 341 and $\frac{213}{109}$ of that Code. The petitioner was convicted under s. 213 and acquited of the other charges.

On appeal by the petitioner the Sessions Judge held that the conviction under s 213 of the Penal Code was not sustainable as it was based upon the statements of the co-accused and upon the inadmissible statement of the deceased. He directed a retrial of the charges under ss. 347 and 213 of the Penal Code on the grounds :—

(1) that the charge of wrongful confinement of which the petitioner had been acquitted related to the alleged confinement [712] at the

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Krishnaprochad outpost, whereas the Magistrate should investigate the confinement of the deceased by the chowkidars at other places.

(2) that from the evidence of the Inspector it appeared that there were three witnesses available, who were not examined.

The *Deputy Legal Remembrancer* (Mr. *Douglas White*) for the Crown. The trial was bad *ab initio* on the ground of misjoinder. The charge against the Head constable under s. 202 of the Penal Code in no way concerned the two chowkidars and they should not have been tried jointly with him. The Sessions Judge should have set aside the proceedings on the ground of misjoinder and directed a fresh trial. The Judge has however ordered a retrial as certain witnesses have not been examined and because he was of opinion that the wrongful confinement was a continuing offence.

If there has been no misjoinder, I submit the order for retrial is correct.

Babu *Dasarati Sanyal* for the petitioner. The question of misjoinder does not arise on this Rule. This point is taken in this Court for the first time. Although the Crown was represented in the lower Court nothing was said as to there being any misjoinder. The evidence in the case is wholly unreliable. The evidence as to the wrongful confinement at the outpost is disbelieved. As to the wrongful confinement at the other places, there is no evidence that the petitioner gave the chowkidars any orders to confine the deceased, that being so the petitioner cannot be held responsible for the acts of the chowkidars after they left his outpost. With regard to the examination of the witnesses the prosecution had ample opportunity to examine them had they thought proper to do so. If the Sessions Judge was of opinion that their evidence was material he should under s. 428 of the Criminal Procedure Code have taken it himself or directed that it should be taken.

PRATT and HANDLEY, JJ. Luchmun Singh, Head constable was placed upon his trial before the District Magistrate of Puri on [713] charges under sections 213, 347 and 202 of the Indian Penal Code. With him were tried two chowkidars against whom charges were framed under sections 341 and $\frac{213}{109}$. In the result Luchmun Singh was convicted of the charge under section 213 and acquitted of the other charges. With the result of the trial of the chowkidars we are not at present concerned.

On appeal by Luchmun Singh the learned Sessions Judge held that the conviction under section 213 was not sustainable, because it was based merely upon the statements of the co-accused and upon the inadmissible statement of the deceased Krupa Sahu. He, however, directed a retrial of both charges, *viz.*, under sections 347 and 213 on the following grounds:—

(1) that the charge of wrongful confinment, of which accused had been acquitted, related to the alleged confinement at the Krishnaproshad outpost, whereas the Magistrate should investigate the confinement of the deceased by the chowkidars at other places;

(2) that from the evidence of the Inspector it would appear that there were at least three other witnesses available, who were not examined owing to some defect in the conduct of the prosecution. Luchman Singh moved this Court and obtained this Rule to show cause, why the order for retrial should not be set aside. We have heard the learned vakil for the petitioner and the Deputy Legal Remembrancer in reply.

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As regards allegations of wrongful confinement at places distant from the Krishnaproshad outpost, where the petitioner remained on duty, it is apparent that the petitoners' criminal responsibility for such acts is too remote to form the basis of any charge. The case is that the Head constable sent away Krupa Sahu in charge of two chowkidars to procure money. If in effecting this object the chowkidars subsequently confined Krupa Sahu, ducked him in a pond or even beat him, it would be impossible to hold the Head constable guilty of abetting such specific acts in the absence of proof (which of course cannot be given) that he gave definite orders to that end.

As regards the examination of three further witnesses the Sessions Judge, if he thought their evidence necessary, should have proceeded under cl. (1) of section 428 of the Criminal Procedure Code.

[714] As the matter stands we find no reason for thinking they could give important evidence. The prosecution was conducted by a pleader and it has not been shown that he exercised an improper discretion in not calling the witnesses.

The Deputy Legal Remembrancer has contended that there was a misjoinder as the charge against the petitioner under section 202 did not concern the chowkidars, who were tried jointly with him. On this ground he asks us to set aside the whole trial as illegal, and to direct a new trial. No such objection was taken before, and we do not think we ought to give effect to it, when dealing with the case on the application of the petitioner and not of the Crown.

We make the Rule absolute and set aside the order for retrial.

Rule made absolute.

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31. C. 715 (=8. C. W. N. 910=1. Cr. L. J. 408.)

[715] APPELLATE CRIMINAL.

Before Mr. Justice Pratt and Mr. Justice Handley.

JOHARUDDIN SARKAR *v.* EMPEROR*

[26th April and 5th and 10th May 1904.]

Transfer—Adjournment of case—Supplementary case, disqualification of Sessions Judge to try—Criminal Procedure Code (Act V of 1898) s. 526, cl. (8).

The accused were committed for trial on the 12th December, 1903. The trial was fixed for the 3rd February 1904 before the Sessions Judge.

On the 3rd February the accused asked the Judge to refer the case to the High Court for transfer on the ground that the Judge had previously convicted other accused persons on the same facts. This was refused.

The accused thereupon applied under s. 526, cl. (8) of the Criminal Procedure Code for an adjournment of the case, on the ground that the High Court would be moved for a transfer. This was refused.

The case proceeded and after the case for the prosecution was concluded two witnesses were examined on behalf of one of the accused and the case was adjourned till the 16th February. Between the 3rd and 16th February no application was made to the High Court for a transfer.

The case was concluded on the 16th February and the accused were convicted.

Held, that the Sessions Judge was not disqualified from trying the case. That the accused had a reasonable time for applying to the High Court before

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Criminal Appeal No. 269 of 1904, made against the order passed by C. Fisher, Sessions Judge of Dinajpur, dated 16th February 1904.