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described as a will said to have been executed by one Dole Govind Adhikari. This individual was the *shebait* of a certain endowment, and the properties referred to in the document in question are properties belonging to the *sripatbari*, otherwise described as the *akhra* of Syam Sundar and Lachmi Narayan *bigrahas*. The document purports, in the first instance, to declare that all the properties in the possession of the testator are properties belonging to the said *sripatbari* and in the next place, it purports to appoint a manager (Adhyakha) for the due performance of the *sebas* and *pujas* and other rites and ceremonies appertaining to the *akhra* in question, and it appoints the petitioner as the next *shebait* with full power and authority to manage, protect and supervise the properties. As already mentioned, it is this document of which probate was applied for by the petitioner. The Subordinate Judge has dismissed the application upon two grounds, first, that the properties mentioned in the document are properties in which Dole Govind Adhikari had no personal right in himself, and, secondly, that the document purports simply to appoint the petitioner as *shebait* or manager (Adhyakha) for the purposes mentioned therein. It has been contended by the learned vakil for the appellant that the view adopted by the Subordinate Judge is erroneous, inasmuch as the right of a *shebait* is a very substantial **[1084]** right, which can be disposed of by a will, and that, therefore, probate may be applied for, and obtained of such a document as the one before us. We are not, however, inclined to agree with the learned vakil in this contention. The word "will" has been defined in the Probate and Administration Act. It means "the legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death." Now, upon the statement of the declarant himself, the alleged testator in the document in question, it is not his property but the property of the *thakurs*. But, however that may be, it is quite clear that all that he does or purports to do by the document in question is to appoint the petitioner as a *shebait* or manager for the purpose of carrying out the *sheba*, *puja*, and other rites and ceremonies appertaining to the *akhra*, of which he was the head. There was no testamentary disposition of the properties belonging to the *akhra*, and indeed he could not make any such disposition. If it was simply an appointment of a manager made by the late Mohunt, it is obvious that there was no disposition of any property. We think that the Court below is right in the view that it has expressed, and that probate of a document like this cannot be applied for under the Probate and Administration Act. We accordingly affirm the order of the Court below and dismiss this appeal with costs.

Appeal dismissed.

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32 C. 1085 (= 10 C. W. N. 51=3 Cr. L. J. 138.)

[1085] CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

SAT NARAIN TEWARI *v.* EMPEROR.*

[20th July, 1905.]

Criminal breach of trust—Charge—Misjoinder of charges—Statement by accused—Confession—Admission—Evidence, admissibility of—Criminal Procedure Code (Act V of 1898) ss. 164, 202, 222, 234, 364.

* Criminal Revision No. 644 of 1905, against the order of C. E. Pittar, Sessions Judge of Gaya, dated June 5, 1905.

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An accused was tried for criminal breach of trust in respect of three distinct sums, and one charge was drawn up specifying all the three sums and the persons from whom he collected them.

He was not charged with three offences, but with one offence under s. 409 of the Penal Code, and was convicted of one offence and sentenced to one term of imprisonment :—

Held, that the charge as framed was not contrary to law, it being in accordance with ss. 222, sub-s. (2) and 234 of the Code of Criminal Procedure.

Emperor v. *Gulzari Lal* (1). *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (2) and *Emperor* v. *Ishtiaq Ahmed* (3) referred to.

Subrahmania Ayyar v. *King-Emperor* (4) distinguished.

An admission or confession made before a Magistrate carrying on an inquiry under s. 222 of the Criminal Procedure Code, is not a statement recorded under s. 164 or 364 of the Code, and is therefore not admissible in evidence against the accused without further proof.

[Fol ; 33 All. 36 : 4 Pat. L. J. 456 ; Diss : 37 Cal. 467.]

RULE granted to Sat Narain Tewari, the petitioner.

The petitioner, Sat Narain, who was the head or collecting member of the *Panchayat* of a village in the Jehanabad subdivision, was charged with embezzlement of three distinct sums of money, *viz.*, Re. 1-11 and Rs. 5 collected on the 5th August 1904, and Re. 1-3 collected on the 20th May from three different persons, as chowkidari tax.

[1086] Sat Narain was succeeded in office by one Raghunandan who complained before the Subdivisional Magistrate of Jehanabad, alleging that Sat Narain had misappropriated the chowkidari tax realised by him from several villagers.

The Sub-divisional Magistrate thereupon held an inquiry under s. 202 of the Code of Criminal Procedure, and in that inquiry recorded a confession made by the petitioner.

The petitioner was placed upon his trial before the Sub-divisional Magistrate on a charge under s. 408 of the Penal Code, but upon an application by the accused the case was transferred by the District Magistrate to the file of a Deputy Magistrate of Gaya.

The Deputy Magistrate framed the following charge against the petitioner :—

" That you between May and August 1904, at Sherpur, being a *sir panch* committed criminal breach of trust in respect of three sums, Re 1-11, Rs. 5 and Re. 1-3, which you collected from Rameswar Misra, Mohesh Lal and Harkhu Singh, respectively, as chowkidari-tax, and thereby committed an offence punishable under s. 109 of the Indian Penal Code and within my cognizance."

The trying Deputy Magistrate was then transferred from the station, and was succeeded by another Deputy Magistrate who, after considering the evidence recorded by his predecessor in office and hearing arguments, convicted the petitioner under s. 409 of the Penal Code, and sentenced him to six months' rigorous imprisonment and a fine of Rs. 100.

On appeal preferred by the petitioner, the Sessions Judge of Gaya affirmed the conviction and sentence.

The petitioner then moved the High Court to set aside the aforesaid conviction and sentence mainly on the grounds that the charge as framed was in contravention of the provisions of s. 233 of the Code of Criminal Procedure, and that the statement of the petitioner recorded by the Subdivisional Magistrate in an inquiry under s. 202 not being a statement under s. 164 or 364 of the Code was inadmissible in evidence, and obtained this rule.

(1) (1902) I. L. R. 24 All. 254.
(2) (1904) I. L. R. 31 Cal. 928.
(3) (1904) I. L. R. 27 All. 69.
(4) (1901) I. L. R. 25 Mad. 61.

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Babu *Dasharathi Sanyal*, for the petitioner. The charge framed in this case, which is in respect of three different offences alleged to have been committed at different times, is in contravention of the provisions of s. 233 of the Criminal Procedure [1087] Code; and alleged offences not constituting one series of acts so connected as to form *one* transaction within the meaning of s. 235 of the Code, the conviction based upon the said charge should be set aside: see *Krishnasami Pillai* v. *Emperor* (1), *Gobind Koeri* v. *Emperor* (2).

As to the statement or confession of the accused, the Subdivisional Magistrate had no authority to record it under s. 164 of the Criminal Procedure Code, in an inquiry under s. 202 of the Code, the statement not having been made during an investigation by the police; nor was it recorded under s. 364 of the Code as the accused was not then being tried for an offence. Such a statement is therefore clearly inadmissible in evidence.

The Deputy Legal Remembrancer (Mr. *Douglas White*) for the Crown. The charge is a perfectly good one regard being had to ss. 222 and 234 of the Criminal Procedure Code. The three offences having been committed within a period of twelve months, the charge comes under s. 234 of the Code, see *Emperor* v. *Gulzari Lal* (3) which was followed in *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (4) and *Emperor* v. *Ishtiaq Ahmad* (5).

As regards the statement by the accused, it was voluntarily made, and it purports to have been recorded under s. 164 of the Criminal Procedure Code, which is not restricted to police inquiry only. The statement, I submit, is therefore admissible in evidence.

Babu *Dasharathi Sanyal*, in reply, referred to *Queen-Empress* v. *Bhairab Chandra Chakrabutty* (6).

RAMPINI AND MUKHERJI, JJ. This is a rule calling upon the District Magistrate of Gaya to show cause why the conviction of and sentence passed upon the applicant should not be set aside, upon the ground that the charge is contrary to law, why the case should not be retried, and why, in the retrial, the statement made by the applicant to the Subdivisional Officer of Jahanabad in the inquiry under section 202 of the Criminal Procedure Code, should not be excluded.

[1088] The facts of the case are these. The applicant, Sat Narain Tewari, was tried for certain offences under s. 409 of the Indian Penal Code. He was the *sir-panch* of the village, that is the collecting member of the *panchayat*, and he is alleged in that capacity to have collected three sums of money in 1904, namely, Re. 1-11 on the 5th August, Rs. 5 on the same date, and Re. 1-3 on the 20th May.

These sums were collected from three persons, Rameswar Misra, Mohesh Lal and Harkhu Singh, as chowkadari-tax. Subsequently the applicant was removed from his post of collecting member and was succeeded by Raghunandan Pershad. Raghunandan Pershad appeared before the Magistrate and gave information that the collections of his predecessor, Sat Narain Tewari, were short; and there is no doubt that this was the case. That being so, Sat Narain was put upon his trial for embezzlement of these three sums; and one charge was drawn up, in which all the three sums and the persons from whom he collected them were specified. But he was not charged with three offences under section 409, Indian Penal Code, but with *one* offence under section 409; and he was convicted of *one* offence and sentenced to one term of imprisonment.

(1) (1902) I. L. R. 26 Mad. 125.
(2) (1902) 6 C. W. N. 468.
(3) (1902) I. L. R. 24 All. 254.
(4) (1904) I. L. R. 31 Cal. 928.
(5) (1904) I. L. R. 27 All. 69.
(6) (1898) 2 C. W. N. 702, 713.

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Now, the first ground upon which the rule was granted was that the charge was illegal, and that the applicant could not be tried on such a charge.

It is unnecessary to discuss this point at length, because we think the charge was in accordance with sections 234 and 222, sub-section (2) of the Criminal Procedure Code, and this has been held in the cases of *Emperor* v. *Gulzari Lal* (1), *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (2) and *Emperor* v. *Ishtiaq Ahmad* (3). That being so, we do not think that the charge in this case comes within the purview of the ruling of the Privy Council in the case of *Subramania Ayyar* v. *King-Emperor* (4). Accordingly, the first ground on which the rule was granted fails.

But there is another ground, namely, that the admission, or confession, of the applicant, made before the Deputy Magistrate of [1089] Jahanabad on the 19th December 1904, is inadmissible in evidence. It has been recorded under section 164 of the Criminal Procedure Code, and it is contended that the Deputy Magistrate had no authority to record the confession under section 164, because the case of the applicant was not then under enquiry before the police. Section 164 occurs in the Chapter of the Criminal Procedure Code relating to information to the police and their powers of investigating. Furthermore, it is contended that it is not a statement recorded under section 364 of the Criminal Procedure Code. That, of course, is obvious, because the applicant was not then being tried for an offence. It is urged that it was a statement made in the course of the enquiry which the Deputy Magistrate was carrying on under section 202 of the Criminal Procedure Code. This would seem to be correct; and that being so, the Criminal Procedure Code does not contemplate a statement on the examination of the petitioner being recorded in such proceeding. We therefore think that the statement of the applicant in this case which has been admitted as proving itself, is not admissible as such in evidence; and we are unable to say whether the evidence, other than this so called confession, is sufficient for conviction.

We accordingly set aside the conviction and sentence, and direct that the applicant be retried.

Whether in the course of the new trial, the admission made by Sat Narain Tewari, when it is obvious he was not in the position of an accused person, can be proved in any way, is a question upon which we do not express any opinion. But we think that when the new trial takes place, the statement which the applicant made to the Deputy Magistrate and which purports to be recorded under section 164 of the Criminal Procedure Code, cannot be admitted in evidence as proving itself.

The rule is made absolute on this ground. The case will go back for retrial. But we consider that it should be retried by some Magistrate other than the Magistrate by whom it has already been tried.

Rule absolute; case remanded.

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(1) (1902) I. L. R. 24 All. 254.
(2) (1904) I. L. R. 31 Cal. 928.
(3) (1904) I. L. R. 27 All. 69.
(4) (1901) I. L. R. 25 Mad. 61.