Appellate Jurisdiction. (a)

Criminal Regular Appeal No. 352 of 1873.

NOUJAN.....*Appellant.*

A prisoner, tried, convicted and punished under Section 369 of the Indian Penal Code of abducting a child with intent dishonestly to take moveable property, cannot also be punished for the theft of a part of the moveable property which he intended dishonestly to take through means of the abduction ; and the second punishment for a theft is by the present Code of Criminal Procedure illegal.

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THIS was an Appeal against the sentence of the Court of North Tanjore in Case No. 55 of the Calendar for 1872.

The Government Pleader in support of the conviction.

No Counsel were instructed for the Appellant.

The facts are sufficiently set forth in the following

JUDGMENT :—The immediate question is whether a prisoner tried convicted and punished under Section 369*(b)* of abducting a child with intent dishonestly to take moveable property can also be punished for the theft of a part of the moveable property, which he intended dishonestly to take through means of the abduction.

Save for the new Code, this course would be illegal under the repeated decisions of this Court.

454. I*(c)* is the section by which this process is to be supported, if at all. If the words of this branch are taken in connexion with those of 452, which precedes it, and of branches II, and III, they do not do so. 452 contains a rule of criminal pleading as to the necessity of a separate charge and a separate trial for each distinct offence. Then 453 (similarly to the English rule as to several embezzlements) modifies this rule as to offences of the same kind committed within a year. The pre-requisites of joinder are similarity of the offences and their falling within the time. Then, strangely

(*a*) Present :—Morgan, C. J. and Holloway, J.

(*b.*) Section 369 of the Penal Code is as follows :—"Whoever "kidnaps or abducts any child under the age of ten years, with the "intention of taking dishonestly any moveable property from the "person of such child, shall be punished with imprisonment of either "description which may extend to seven years, and shall also be liable "to fine."

(*c.*) The sections of the Code of Criminal Procedure (Act X of 1872) which bear upon the question decided in this case are Sections 452 to 456 both inclusive.

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enough, Section 455 is quoted as the key to the similarity, and the result seems to be that they are similar when it is doubtful to which of them the proveable facts in each may amount. It can, we suppose, scarcely be meant that the element of doubt is to be the governing point. It perhaps means that where, as in the illustration, the criminative facts, which constitute the offence, are so nicely shaded that it is often doubtful *primâ facie* to which specific definition the facts are to be subsumed, there may be a joint trial.

A further modification of the rule of severance is introduced in 454. I. Where facts "so united as to form the same transaction" fulfil the requisites of the definitions of several offences there may be one charge and one trial. Nothing here is said about the punishment and we have still a mere rule of criminal pleading modifying the general rule.

It is not until we come to the illustrations that we find punishment imported, and with the exception of (c and d) it may perhaps be said that the offences are all different in character. Those are mere transcripts of decided cases which seem inconsistent with the principles of others decided by the same Court. (e.) is perhaps reconcileable if the kidnapping was for a different purpose, but if the kidnapping was for the purpose of subjecting to slavery, it will be impossible to reconcile it with other decisions and with the subsequent parts of this section.

(b) embraces the case of three murders and the legal principle is sound, though perhaps the application in practice will be found difficult.

If we take the section there is, therefore, nothing to overrule the previous decisions, but undoubtedly the kidnapping illustration is opposed to former decisions and unless explained as above is a direct authority for the two sentences passed in the present case.

If, however, we are to import the illustrations as a gloss upon I, and as explanatory of its meaning, we must perform the like operation upon III, and must if possible reconcile all the three parts of the section.

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III says that where several facts aggregated form one offence and if served constitute several, the offender may be charged with every offence committed but the utmost punishment awardable is the extreme punishment for the concrete or for one of the separate offences. We presume that the Court may elect whether it will punish for the one or the other but it may not punish for both.

Now the words of the section do not meet the case. Kidnapping with intent to steal is not an offence formed by the union of kidnapping with stealing but by the union of kidnapping with intent to do it, and the result on the mere words would be that the section contains no inhibition of two punishments.

The illustrations however show that the framers imagine that they had provided for the further case of the second offence being the substantive criminal act which was the aim of the intention in the former and therefore evidentiary matter of that intent. Thus (n.) housebreaking with intent to commit adultery and the commission of it may not be separately punished. Still nearer to the present case is (p.) The enticing away (it does not even say for the purpose of committing adultery) and adultery may not be separately punished. The measure of the punishment is here again the largest amount awardable for one of the offences.

The section therefore with its illustrations forbid two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other. It is not narrowed to offences of a cognate character, for housebreaking and adultery have no more connexion than kidnapping and theft. We come to the conclusion therefore that, despite the inaptness of the words, there is nothing in these sections intended to alter the law, that, unless the illustrations are looked at, there is nothing to alter the principles upon which punishments were awarded before the Act passed, and that when they are all taken together those attached to a branch which does introduce a limitation upon the power of punishment must prevail over those attached to what is by itself a mere rule as to the joinder of charges.

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Read I and II together, they come to this,—you may join them, but if when joined several make up one compound offence, you shall only punish for one. They shall be considered to make up such a compound, when one of them is the criminal result at which the other has arrived. You may then punish to the extent permissible for any one of them, but you shall not tack the punishments together.

In our opinion this second punishment for the theft is by the present Code as it was by a long course of previous decisions, which the Code is professing to follow, absolutely illegal. It must therefore be quashed.

We doubt whether, on this evidence, there could properly have been a conviction for simple kidnapping. It is the very subsequent theft which shewed the act not to be a perfectly innocent one, stamped it with its criminal character, and shewed by the completed act that there was abduction with the intent which that act executed.

Appellate Jurisdiction.(a)

Special Appeal No. 378 *of* 1874.

PUDISHARY KRISHNEN, NUMBUDRY AND ANOTHER. } *Special Appellants.*

KARAMPALLY KUNHUNNI KURUP. } *Special Respondent.*

The plaintiff, under threat of a criminal prosecution for the offence of criminal trespass, executed an agreement in writing which conferred certain rights on the defendant. There was no foundation for the charge made by the defendant.

In a suit to set aside the agreement. *Held*, that the plaintiff was entitled to maintain the suit.

1874. July 8. S. A. No. 378 of 1874.

THIS was a Special Appeal against the decision of J. K. Ramen Nair, the Subordinate Judge of South Malabar, in Regular Appeal No. 225 of 1873, reversing the decree of the Court of the District Munsif of Calicut, in Original Suit No. 434 of 1872.

This suit was brought for a declaration that plaintiffs and their father, 2nd defendant are the uralers of a temple

(a) Present : Holloway, and Innes, JJ.