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BIDHU CHANDALINI v. MATI SHEIKH MONDAL.

1900, JUNE 21. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by

PRINSEP, J.—The terms of s. 369 of the Code of Criminal Procedure, on which the Sessions Judge relies in making this reference, must be read as controlled by s. 437. S. 437 does not limit the power of a District Magistrate to make, or order a Subordinate Magistrate to make, further inquiry into a case in which an order of dismissal or discharge may have been passed by a Subordinate Magistrate. There is no bar to a District Magistrate making further inquiry himself into a case in which such order may have been passed by himself.

We, therefore, see no sufficient reason to interfere as a Court of Revision.

D. S.

CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Handley.

1900
June 28.

KUMUDINI KANTA GUHA AND ANOTHER (PETITIONERS) *v.* THE QUEEN-EMPRESS (OPPOSITE PARTY).*

Criminal Proceedings—Joint trial—Misjoinder of parties—Discharge of accused on ground of misjoinder by Sessions Judge—Direction that accused be re-tried—Jurisdiction—Code of Criminal Procedure (Act V of 1898) ss. 233, 239, 423 and 537—Penal Code (Act XLV of 1860) ss. 411, 414 and $\frac{414}{109}$.

M and *K* were convicted at the same trial of receiving stolen property, namely, currency notes, as well as of assisting in concealing or disposing of such notes which they knew or had reason to believe were stolen property. Each of them were charged with the same offences only in respect of a currency note of Rs. 500, but in respect of the charges on two other notes of Rs. 100 each the charges against each of them related only to one of these notes. *Held* that there had been a misjoinder of parties, the transactions being altogether separate and distinct against each of them.

Held further that the Sessions Judge in discharging one of the accused on the ground of misjoinder of parties had power to add to that order a direction that the accused should be re-tried. It was not obligatory on him to leave to the discretion of the Magistrate the course which should be taken in such a matter, and it was not intended by the order of

* Criminal Revision Nos. 300 and 329 of 1900, made against the orders passed by A. Pennell, Esquire, Sessions Judge of Noakhally, dated the 10th of February 1900.

discharge in the case of *Queen-Empress* v. *Chandi Singh* (1) to free the accused in that case from the consequences of his acts or to declare that no order for retrial could be passed in such a case. *Queen-Empress* v. *Fakirapa* (2) and *Empress of India* v. *Murari* (3) referred to.

ON the 4th of February 1899 the complainant and his brother borrowed Rs. 4,000 from a firm at Barisal, and complainant received thirty-nine notes of Rs. 100 each from that firm. The complainant further borrowed Rs. 2,000 from the Loan Office there, and received four notes of Rs. 500 each. With some notes to the value of Rs. 5,900 complainant went to Noakhali on the 6th of February. He kept the notes, some cash papers and other articles in a wooden box in charge of his servant, and went to the Judge's Court. On his return at 2 P.M. he found the box with its contents missing. Thereupon he went to the thanna and gave information, and subsequently he gave the police the numbers of the notes. In July and August 1899 three of the notes were traced, and the accused Mohesh Chandra Guha was arrested. Whilst his trial was proceeding, the accused Kumudini Kanta Guha, the son of Mohesh, was arrested, and both accused were tried jointly under s. 239 of the Code of Criminal Procedure by a Deputy Magistrate of Noakhali. The accused Mohesh Chandra Guha was convicted with respect to a note $\frac{A.A.}{36}$ 01030 for Rs. 100, (1) of dishonestly retaining it under s. 411 of the Penal Code; and (2) of voluntarily assisting in disposing of it under s. 414 of that Code; also with respect to a note $\frac{Y}{22}$ 95,272 for Rs. 500, (3) of abetment of an offence under s. 414 of that Code stated to have been committed by the other accused.

The accused Kumudini Kanta Guha was convicted with respect to the same note which formed the subject matter of the 3rd charge against the accused Mohesh Chandra Guha, *viz.*, $\frac{Y}{22}$ 95272 (1) of dishonestly retaining it under s. 411 of the Penal Code, and (2) of voluntarily assisting in disposing of it under s. 414 of that Code; and with respect to a note $\frac{AA}{35}$ 92608 for Rs. 100, (3) of voluntarily assisting in disposing of it under s. 414 of that Code.

(1) (1887) I. L. R., 14 Calc., 395.
(2) (1890) I. L. R., 15 Bom., 491.
(3) (1881) I. L. R., 4 All., 147.

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The accused appealed to the Sessions Judge of Noakhali who on the 10th of February 1900 affirmed the conviction of the accused Kumudini Kanta Guha on one of the charges, and set aside the conviction of the accused Mohesh Chandra Guha, and directed a re-trial to be held.

Objection was taken on behalf of the accused to this joint trial in the Magistrate's Court, and after their conviction it was renewed in the Court of Appeal. It was further contended in revision that the Sessions Judge had no jurisdiction to pass the order for the re-trial of Mohesh Chandra Guha.

Mr. *C. R. Dass* for the petitioners.

Babu *Srish Chunder Chowdhry* for the Crown.

1900, JUNE 28. The judgment of the Court (PRINSEP and HANDLEY, JJ.) was delivered by—

PRINSEP, J.—The rules before us have been obtained by Mohesh Chandra Guha, the father, and Kumudini Kanta Guha, the son, who have been convicted at the same trial by the Magistrate of receiving stolen property, namely, currency notes, as well as under s. 414 of the Indian Penal Code of assisting in concealing or disposing of such notes which they knew or had reason to believe were stolen property.

In trying these two persons together in the same trial, there has, no doubt, been a misjoinder of parties. Each of these persons is charged with the same offences only in respect of a currency note of Rs. 500, but in respect of the charges on the two currency notes of 100 the charge against each of the accused related only to one of these currency notes, and, therefore, the transaction was altogether separate and distinct against each of them.

There is no reason why, in respect of the matter connected with the note of Rs. 500, the two petitioners might not be properly tried together, but the other charges certainly could not have formed part of the same trial. The possession stated to have been acquired by each of these petitioners in respect of each of these notes of Rs. 100 was at different times, and it would seem that neither of these transactions is in any way connected with the transaction relating to the note of Rs. 500,

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Objection appears to have been taken from the very first in the Magistrate's Court to this joint trial and, after the conviction of the petitioners, it was renewed in the Court of Appeal. The Sessions Judge has held that it has seriously prejudiced the petitioners. He has also observed that the evidence is so complicated in respect to each of these charges that it is impossible to separate it in order to try the case under one charge against either of the prisoners. He has accordingly on this ground set aside the conviction, and the sentence passed on Mohesh, and directed a re-trial to be held.

In respect of the other petitioner, Kumudini, the Sessions Judge has found that he can be properly convicted on his own confession, and he has accordingly affirmed the conviction and sentence on one of the charges on this confession.

Objection has been taken before us by the learned Counsel that the Sessions Judge had no jurisdiction to pass the order for the re-trial of Mohesh and, as authority for this, we have been referred to the case of *Queen-Empress* v. *Chandi Singh* (1). We find that, in that case, the learned Judges held that the misjoinder made the proceedings illegal, and they accordingly held that the proceedings were altogether void. The order that was passed was to direct that the prisoner be discharged from custody. On this, it is contended that there was no power to do more than to discharge the accused, and that the form of order which should have been passed by the Sessions Judge on the appeal should have been the same as was passed in the case of *Queen-Empress* v. *Chandi Singh* (1). On the other hand, we find in other reported cases, for instance in the case of *Queen-Empress* v. *Fakirapa* (2), as well as in the case of *Empress* v. *Murari* (3), that after an order of discharge a re-trial was ordered. We think that we cannot properly conclude from the case of *Queen-Empress* v. *Chandi Singh* (1) that the learned Judges meant

(1) (1887) I. L. R., 14 Cal., 395.

(2) (1890) I. L. R., 15 Bom., 491.

(3) (1881) I. L. R., 4 All., 147.

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that a Court, in discharging the accused on the ground of misjoinder of parties, had no power to add to that order a direction that the accused should be re-tried. A fresh trial could be held because the accused had not been acquitted. It is, however, contended that further proceedings should be left in the discretion of the Magistrate. We think that there is no reason at all why the Superior Court should not point out to the Magistrate the course which should be taken in such a matter, and that it was not intended by an order of discharge in the case of *Queen-Empress* v. *Chandi Singh* (1) to free the accused from the consequences of his acts, or to declare that no order for re-trial could be passed.

The learned Counsel next contends that the Sessions Judge, on the appeal of Mohesh, should have decided whether there was evidence on which a re-trial could properly take place. But we find that the Sessions Judge has stated as the ground on which he directed a re-trial that the evidence on each of the charges was so mixed up that it was impossible to distinguish it in respect of any particular charge. Had it been otherwise, we think, the Sessions Judge might have determined whether the conviction and sentence passed on the appellant could be maintained on evidence properly admissible and considered separately in respect of any of the charges. For these reasons, we cannot hold that the learned Sessions Judge had no reason for the order which he made, and we also think that he was competent to make such order. The rule, therefore, in the case of Mohesh Chandra Guha (No. 329) is discharged.

It remains for us to consider the case of Kumudini Kanta Guha. We cannot understand on what grounds the Sessions Judge has distinguished this case, for he finds, as in the case against Mohesh Chandra, that the prisoner has been prejudiced by the irregularity of misjoinder. No doubt, the Sessions Judge has relied on statements made by Kumudini which, he says, amount to a confession, but we think that these statements should be taken in connection with the other evidence in the case, and that for this reason it would not be just and proper to convict solely on those statements. We accordingly set aside the conviction and

(1) (1887) I. L. R., 14 Calc., 395.

sentence passed on Kumudini Kanta, and we direct that a re-trial be also held in his case.

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We would point out to the Magistrate that it will be for him to consider whether, having regard to the facts of the case, separate trials should be held in respect of the charge relating to the note of Rs. 500.

D. S.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

A. T. RICKETTS, MANAGER OF PACHETE ENCUMBERED ESTATE (PLAINTIFF) v. RAMESWAR MALIA AND ANOTHER (DEFENDANTS).*

1900 *Aug.* 2.

Res judicata—Evidence—Presumption—Landlord and Tenant—Suit for Road and Public Works cesses—Cess Act (Bengal Act IX of 1880), ss. 34, 35, 36, 41—Valuation roll, publication of—Liability to pay cess for rent paying land.

Previous decrees for cesses at a certain rate obtained by a landlord against a tenant, do not operate as *res judicatæ* in a subsequent suit for cesses claimed at a higher rate, although they are admissible as evidence in the suit and may raise a presumption in favour of the tenant.

Liability to pay road cess, so far as rent-paying lands are concerned, does not depend upon the publication of the valuation roll under s. 34 of the Cess Act. *Bhugwati Kuweri Chowdhrani* v. *Chutter Singh* (1) followed; *Ashanullah Khan Bahadur* v. *Trilochan Bagchi* (2) distinguished.

THE plaintiff brought this suit for recovery of rent and cesses in arrear amounting to Rs. 135-15 annas for the years 1300 to 1302 B. S., and part of the year 1303 B. S. The rent was claimed at the rate of Re. 1 per annum, and the cesses at the rate of Rs. 28 per annum. The claim was in respect of a *mehal*, mouzah Koilamara, under *khas* collection, held by the defendants, appertaining to the zemindari of the Pacheto Encumbered Estate, under the management of the plaintiff, and included damages.

* Appeal from Appellate Decree, No. 2057 of 1898, against the decree of Babu Kader Nath Mozumdar, Subordinate Judge of Burdwan, dated the 23rd June 1898, modifying the decree of Babu Dandodhari Biswas, Munsif of Ranigunge, dated the 2nd of September 1897.

(1) (1898) I. L. R., 25 Calc., 725.
(2) (1886) I. L. R., 13 Calc., 197.