CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BIPIN CHANDRA PAL

v.

EMPEROR.*

1907
Nov. 20.

Misjoinder of charges—Distinct offences on different dates during same trial—Presidency Magistrates—Refusal to take oath or answer questions—Criminal Procedure Code (Act V of 1898) ss. 233, 234, 235, 482—Penal Code (Act XLV of 1860) ss. 178 and 179.

Where the accused was charged under two heads, *first*, with offences under s. 178 of the Penal Code committed on the 26th and the 29th August respectively; and, *secondly*, with offences under s. 179 of the Penal Code committed on the above dates during the course of the same trial:—

Held per RAMPINI J., that the trial was under the special procedure provided for Presidency Magistrates, that no charge sheet was required to be drawn up, that there was no trial in the sense of an investigation of the facts, that the petitioner had been convicted only of three offences, two of which were of the same kind, and that s. 234 of the Criminal Procedure Code had not been contravened.

Subrahmania Ayyar v. *King-Emperor*(1) distinguished.

Held, further, that a Court acting under s. 482 of the Criminal Procedure Code is not bound to take proceedings on the same day, as it is when acting under s. 480.

Per SHARFUDDIN J., that the accused was not charged with, nor tried at one and the same trial for more than three offences of the same kind, and that s. 234 did not, therefore, apply, but that the case fell within s. 235, and that there was, therefore, no misjoinder of charges.

ON the 26th August, 1907, during the trial of *Emperor* v. *Arabinda Ghose* and others before the Chief Presidency Magistrate for the offence of sedition published in the "*Bande Mataram*," the petitioner was called as the seventh prosecution witness. On going into the witness box he said to the Magistrate "I refuse to take any oath or solemn affirmation. I have been subpœnaed to give evidence in this case." The Magistrate then put him

* Criminal Revision No. 1279 of 1907, against the order of Ram Anugraha Narain Sing, Third Presidency Magistrate of Calcutta, dated Sept. 10, 1907.

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the question "Do you know the paper "*Bande Mataram?*" to which he replied "I decline to answer this question." He was then asked "Do you decline to answer any question in this case?" and he said "I do." The petitioner was then bound down to appear the next day, but the case was not taken up till the 29th idem when he was again asked to take the oath or affirmation and to answer questions as a witness, and he again declined to do either. The Chief Presidency Magistrate, thereupon, drew up a proceeding under section 482 of the Criminal Procedure Code against him and sent him for trial before the Third Presidency Magistrate for "an offence under s. 178 and s. 179 I. P. C." The latter took up the case on the 10th September and framed two heads of charges.

The first charge stated that the petitioner "had on the 26th and 29th August refused to bind himself by taking an oath or affirmation or to answer any question put to him as a witness, and that he had thereby committed offences under s. 178 of the Indian Penal Code." The other alleged that he "had on the same dates refused to answer questions put to him thereby committing offences under s. 179 of the Indian Penal Code."

The prisoner then made a statement that he had conscientious scruples to take any part in the prosecution, and that he had therefore refused to be sworn or affirmed in the case. The Magistrate examined one witness, heard both parties, and convicted him of an offence under s. 178 of the Indian Penal Code committed on the 26th, and under ss. 178 and 179 of the same Code of offences committed on the 29th, acquitting him of an offence under s. 179 on the former date. The petitioner was sentenced to six months' simple imprisonment for each offence, but the sentences were made concurrent.

Mr. C. R. Dass (*Babu Sarat Chunder Sen* with him), for the petitioner. The trial is invalid for misjoinder of charges. The offences of the 26th August were completed on that day, and were distinct from the offences committed on the 29th. The joinder of offences under ss. 178 and 179 of the Indian Penal Code was in contravention of s. 234 of the Criminal Procedur Code and rendered the trial bad: *Subrahmania Ayyar* v.

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King-Emperor(1). Next, the commitment was illegal. The Magistrate could not on the second day take action in respect of the offences of the first day. The proceedings in respect of the latter should have been drawn up on the same day. The commitment is bad also for want of specification of the offence committed. The Magistrate says "an offence;" he intended only *one* offence, that is, either under s. 178 or s. 179 of the Indian Penal Code. Then on the 29th August the position of the petitioner, if he had committed any offence on the 26th, was that of an accused, and he could not be called upon to take any oath or to be affirmed. Further, s. 179 of the Indian Penal Code only applies where a person who is on oath refuses to answer questions.

RAMPINI, J. The petitioner, Bipin Chandra Pal, was convicted on the 10th September last of three offences under sections 178 and 179 of the Penal Code, and sentenced to three terms of six months' simple imprisonment, the sentences to run concurrently. The present application for revision was presented to the Vacation Bench on Monday, the 4th instant. Mr. Das appeared on the 11th instant in support of it.

Mr. Das contends (*i*) that the conviction of his client is illegal on the following grounds: (*a*) that there was misjoinder of charges, (*b*) that the commitment order was illegal, and (*c*) that it contained no specification of the offences alleged to have been committed; (*ii*) that the offences are alleged to have been committed on the 26th and 29th August, and the commitment order was not drawn up until the latter date: and (*iii*) that the petitioner was an accused on the 29th August, and so should not have been required to take an oath. The facts are that the petitioner was called as a witness for the prosecution in the case of *Emperor* v. *Arabinda Ghose* under section 124A. On the 26th August last he was put into the witness-box, but he declined to take the oath or to answer any questions put to him with regard to the case. He was then required to execute a personal recognizance of Rs. 50 to appear again. On the 29th August he was again called on to take the oath and answer questions, but he

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again declined to do either. The Chief Presidency Magistrate, before whom the petitioner had appeared as a witness, then recorded the facts, and sanctioned and directed his prosecution before the Third Presidency Magistrate. On the 4th September, at the request of the petitioner's counsel, the case was postponed to the 10th September. On the 10th September the petitioner was convicted of three offences under sections 178, 179 and 178 of the Penal Code and sentenced as already mentioned.

The first objection urged by the learned counsel for the petitioner is that the trial was illegal as there was misjoinder of charges. He relies on the case of *Subrahmania Ayyar* v. *King-Emperor* (1). But the decision of their Lordships of the Privy Council in that case can have no application to the present. The trial in the present case was a summary one under the special procedure provided for Presidency Magistrates' Courts. No charge sheet was required to be drawn up. Furthermore, there was no trial in the sense of an investigation of facts, for the facts were all admitted by the petitioner. The petitioner can have in no way been prejudiced by charges with two heads, in each of which he was charged with committing offences under sections 178 and 179, being drawn up. He was convicted of only three offences, two of which are of the same kind. The provisions of section 234 have, therefore, not been contravened. He has been sentenced to practically one punishment for all three offences.

Then the learned counsel for the petitioner impugns the correctness of the order of the Chief Presidency Magistrate sanctioning and directing his prosecution before the Third Presidency Magistrate. In particular it is objected that the Chief Presidency Magistrate directed his prosecution for "an offence under sections 178 and 179" which, it is said, would not justify his prosecution for two offences under section 178, and one under section 179. An offence under section 178 is quite distinct from one under section 179. The Chief Presidency Magistrate could not have meant, as the learned counsel contends he did, that the petitioner should be prosecuted for only one offence, *i.e.*, that the prosecution should be either under section 178 or section 179. The Chief Presidency Magistrate

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no doubt meant that the petitioner should be prosecuted for an offence under section 178 and for an offence under section 179. But in any case the petitioner has been in no way prejudiced, for he has been sentenced to undergo only one period of simple imprisonment, to which he was liable for one offence under section 178 or section 179. There is no question as to the facts for, on his own showing and that of his learned counsel, he clearly committed offences under sections 178 and 179.

The learned counsel's next contention is that the Magistrate should have recorded the facts and passed the order of commitment on the 26th August, and that he had no right to abstain from passing orders on the 26th August and to recall the petitioner on the 29th August and again call on him to take the oath and give evidence. The Chief Presidency Magistrate proceeded under section 482 of the Criminal Procedure Code. There is no provision in this section, as there is in section 480, that he should take proceedings the same day as that on which the offence is committed. The Magistrate's procedure in postponing orders to the 29th August was no doubt prompted by a humane desire to give the petitioner a *locus penitentiæ* and an opportunity of purging himself of his contempt, and not by any wish to lead the petitioner into committing further offences.

The learned counsel's next contention is that on the 29th August the petitioner was an accused and no oath should have been required of him. But he was called on to take an oath as a witness and not as an accused. No oath was required of him as an accused.

The last question that arises is as to the sentence. The petitioner has practically been sentenced to only six months' simple imprisonment. Considering the nature of the case in which the petitioner was called on to give evidence and of the deliberate character of the attempt made by him to frustrate and impede the administration of justice, I do not consider the sentence too severe. The application is rejected.

SHARFUDDIN, J. The petitioner in the present case is one Bipin Chandra Pal. He was convicted by the Third Presidency Magistrate, on the 10th of September last, of three offences,

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namely, two under section 178 of the Indian Penal Code committed on the 26th and 29th of August last, and one under section 179 of the Indian Penal Code committed on the 29th of that month, and sentenced to six months' simple imprisonment for each of the above offences, the sentences to run concurrently. The petitioner now applies for a revision.

The original case, in which the petitioner was summoned as a witness for the prosecution, was the case of *Emperor* v. *Arabinda Ghose* under section 124A. It appears that one of the dates for the hearing of that case was the 26th of August last. The petitioner on appearing as a witness was required to bind himself by an oath or affirmation to state the truth, but he refused to do so.

The Chief Presidency Magistrate who was trying the original case took a personal recognizance from the petitioner to appear on the following day. The petitioner's case was adjourned on the 27th and 28th of August last, and on his re-appearance on the 29th of August he again refused to bind himself by oath or affirmation. On both the dates he also refused to answer any question with reference to the case in which he was called as a witness.

On the 29th of August the Chief Presidency Magistrate drew up a proceeding against the petitioner requiring him, under section 482 of the Criminal Procedure Code, to appear for trial on the 4th of September before the Third Presidency Magistrate for "an offence under sections 178 and 179 I. P. C."

It appears that the petitioner has admitted all the facts with reference to his refusal to take any part in the prosecution of Arabinda Ghose.

The trying Magistrate has drawn up a charge with two heads, *first*, under section 178 of the Indian Penal Code, regarding offences committed on the 26th and 29th of August last; *second*, under section 179 regarding offences committed on the above dates. The trying Magistrate has acquitted the petitioner with regard to the offence under section 179 of the Indian Penal Code committed on the 26th of August, and has convicted him of the other three offences and sentenced him as above stated.

We have been asked to quash the sentences on the following grounds: (*i*) that there was misjoinder of charges, the provisions

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of section 234 of the Criminal Procedure Code having been contravened; (*ii*) that the order of commitment was not in accordance with law, inasmuch as the said order does not specify the offences that are said to have been committed; (*iii*) that the offences having been committed on the 26th and 29th of August, the trying Magistrate was wrong in drawing up any proceeding on the 29th of August with reference to the offences committed on the 26th of that month; (*iv*) that from the 26th of August the position of the petitioner being that of an accused, the lower Court was wrong in requiring him on the 29th of August to bind himself by oath or affirmation; (*v*) that the petitioner, having once committed an offence under section 178 of the Indian Penal Code cannot be held to have committed a further offence under section 179 of the Indian Penal Code, as the section provides for the case of a witness who, being on oath, refuses to answer any question relevant to the inquiry.

The Third Presidency Magistrate has sentenced the petitioner practically to only one punishment of six months' simple imprisonment for all the three offences and, under the circumstances, in accordance with the special procedure, it was not necessary for him to draw up any charge sheet at all. It is urged that the provisions of section 234 of the Criminal Procedure Code have been contravened inasmuch as the petitioner has been charged with, and tried at one trial for more than three offences.

What appears to have been forbidden under the provisions of section 234 of the Criminal Procedure Code is that when a person is accused of more offences than one *of the same kind* committed within the space of twelve months from first to the last of such offences, he ought not to be charged with, and tried at one trial for, more than three of such offences. Clause (*2*) of that section provides that offences are *of the same kind* when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law. Before the application of the provisions of section 234 of the Criminal Procedure Code to the petitioner's case we have to find out whether all the requirements of this section are present in his case; for, if they are not so this section can have no application. The petitioner was charged for having committed two distinct

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offences under two different sections of the Indian Penal Code on the 26th of August last, and again two distinct offences under two different sections of the Indian Penal Code on the 29th of that month. It is, therefore, clear that the petitioner was not charged for more than three offences *of the same kind*, nor was he tried at one and the same trial for more than three of such offences. Under the above circumstances, the petitioner's case does not fall under section 234 of the Criminal Procedure Code.

The provisions of section 233 are general in nature, requiring that there should be a separate charge and separate trial for every distinct offence, except in the cases mentioned in sections 234, 235, 236 and 239 of the Criminal Procedure Code. I have already observed that section 234 has no application as the offences are not *of the same kind*.

Section 235 of the Criminal Procedure Code relates to the case of a person who, in one series of acts so connected together as to form the same transaction, has committed more than one offence. This section provides that in such a case the accused person may be charged with, and tried at one trial for, every such offence. The transaction here referred to is marked by oneness as to time and place. Illustrations (*a*), (*b*) and (*c*) refer to cases where different offences form parts of one continuous series of acts. In deciding the question whether the acts alleged form parts of the same transaction, the elements for consideration should be the proximity of time and the intention and similarity of action. In the present case there was proximity of time and the intention of the petitioner was clearly to frustrate and impede the administration of justice by refusing to give evidence in the case in which he was called to give evidence. I think that the petitioner's case clearly falls under section 235 of the Criminal Procedure Code. For the above reasons, I am of opinion that there was no misjoinder of charges.

The second objection urged on behalf of the petitioner is that the order of commitment does not specify the offences that are said to have been committed by him. The Chief Presidency Magistrate in his order of commitment says that in his opinion Bipin Chandra Pal had committed "an offence under sections 178

and 179 I. P. C." An attempt is now made to take advantage of the expression "an offence." It is urged that the petitioner was committed for trial for having committed only one offence. From the wording and general tenor of the commitment order it is clear that the order of commitment related to offences under sections 178 and 179 of the Indian Penal Code, and not to any one offence as urged.

The third objection is that the commitment order, dated the 29th of August, ought not to have referred to the offences committed on the 26th of that month. It is contended that section 482 of the Criminal Procedure Code ought to be read with the two previous sections and, as no proceeding was drawn up on the 26th of August, the Chief Presidency Magistrate had no power to draw up a proceeding on the 29th of August with reference to what had happened on the 26th of that month. Assuming that section 482 of the Criminal Procedure Code required the proceeding to be drawn up on the day the offences were committed, this objection is of no avail to the petitioner inasmuch as the proceeding of the 29th of August related also as to what had happened on that date. The petitioner has been convicted under sections 178 and 179 of the Indian Penal Code for offences committed on the 29th of August and for each of these offences, he has been sentenced to six months' simple imprisonment to run concurrently. If the conviction and sentence under section 178 of the Indian Penal Code for the offence committed on the 26th of August cannot stand on the above ground, the other sentences remain as they are.

The fourth objection is that the petitioner was an accused on the 29th of August, and the Chief Presidency Magistrate was wrong in recalling him on the 29th and directing him to take an oath and answer questions put to him. There is no doubt that the petitioner was an accused party in his own case, *i.e.*, in the case of *Emperor* v. *Bipin Chandra Pal*, but his position as an accused in his own case did not affect his position as a witness in the case of *Emperor* v. *Arabinda Ghose*. There is no law that disqualifies an accused party from giving evidence in a case in which he is simply called as a witness and himself is not an accused.

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The fifth objection is that the petitioner, having once committed an offence under section 178 of the Indian Penal Code, cannot be held to have committed a further offence under section 179 of the Indian Penal Code, as the latter section provides for the case of a witness who being on oath refuses to answer questions relevant to the inquiry. Assuming that this proposition of law is correct, there still remains the petitioner's conviction and sentence under section 178 for his refusal to take the oath on the 29th of August.

The petitioner admits in his written statement that every member of society is bound to help the administration of justice by giving evidence in the interest of social well-being, and also admits having refused to take the oath. He further says in his written statement that his refusal was actuated by the belief that the prosecution was prompted by executive policy. The petitioner appears to be a journalist and a preacher and presumably a man of education. That being so, I do not consider that a sentence of six months' simple imprisonment, even under one section, namely, section 178 of the Indian Penal Code, for his deliberate refusal to take an oath on the 29th of August, is at all excessive. I concur with my learned brother in rejecting this application.

Application refused.

E. H. M.