dan (1), *Sowdut Roy* v. *Sreecanto Maity* (2), and *Bhugwan Kritiratna* v. *Chundra Mala Gupta* (3).

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The case will be remitted to the Court of first instance, in order that the objection taken by the judgment-debtors may be investigated upon evidence to be adduced by the parties. The appellants are entitled to their costs both here and in the Court of Appeal below. The costs in the Court of first instance will abide the result.

Appeal allowed; case remanded.

S. C. G.

(1) (1888) I. L. R. 12 Bom. 400.
(2) (1906) I. L. R. 33 Calc. 639.
(3) (1902) I. L. R. 29 Calc. 773; 1 C. L. J. 97.

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1911

Feb. 7.

KALI DAS CHUCKERBUTTY

v.

EMPEROR.*

Misjoinder—Commission of criminal breach of trust in the same transaction as abetment of cheating and attempt to cheat and as part of a common design—Joint trial of one accused under ss. 408 and $\frac{420}{109}$ with another under ss. $\frac{420}{511}$ of the Penal Code—Legality of separate sentences—Concurrent sentences—Criminal Procedure Code (Act V of 1898) s. 239.

Where A, a railway ticket collector, made over two used tickets, which he had collected from passengers, to B, and instructed him to apply for a refund of the fares covered by the same, as unused tickets, at the place of issue, and the latter proceeded there and made such an application but was discovered in the act:—

Held, that the joint trial of A on charges under ss. 408 and $\frac{420}{109}$ and of B, under ss. $\frac{420}{511}$ of the Penal Code, was legal under the provisions of s. 239 of the Criminal Procedure Code.

* Criminal Revision, No. 69 of 1911, against the order of T. S. Macpherson, Additional Sessions Judge of Hooghly, dated Dec. 20, 1910.

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Parmeshwar Lal v. *Emperor* (1) distinguished. *Subrahmania Ayyar* v. *King-Emperor* (2) referred to.

Held, also, that A had committed two distinct offences in the same transaction and that seperate sentences were not illegal, though concurrent sentences were, under the circumstances, more appropriate.

Re Noujan (3) referred to.

The two parts of section 239 of the Criminal Procedure are not mutually exclusive: so that if A induces B to cheat, and B attempts to do so, they may be tried together for abetment of, and attempt at, cheating respectively; and if in the course of the same transaction A commits the separate offence of criminal breach of trust, in furtherance of the conspiracy to cheat, he may be separately charged for such offence at the same trial.

ON the 12th September, 1910, the petitioner, a ticket-collector in the service of the East Indian Railway Co. at Sheoraphuli, gave one Aswini Kumar Seal two used third class tickets, issued on the morning of the same day from Haripal, on the Tarkessur Branch line, to Sheoraphuli. The latter entered the train which was then at the Sheoraphuli station and proceeded to Haripal. After alighting from the carriage he went out of the station for a few minutes, and then returned and went to the Assistant Station Master and demanded a refund of the fares on the two tickets given him by the petitioner, alleging that his aunt had purchased them for herself and another female but was too ill to travel. It appeared that an audit-inspector, Annada Charan Chatterjee, who had been placed on special duty to detect ticket frauds and had seen the petitioner hand over the tickets to Aswini at Sheoraphuli, followed the latter in the same train to Haripal. The Assistant Station Master took Aswini to the office of the Station Master where the auditor was then present. The latter challenged Aswini, who thereupon admitted that the tickets had been given him by the petitioner. He also wrote out a confession to the effect that the petitioner, who was a friend of his, had given him the tickets with instructions to return with one ticket and to sell the other. Aswini was taken to Sheoraphuli where he identified the petitioner as the person who had handed him the tickets.

(1) (1909) 13 C. W. N. 1089. (2) (1901) I. L. R. 25 Mad. 61.
(3) (1874) 7 Mad. H. C. R. 375.

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The petitioner and Aswini were tried together before the Deputy Magistrate of Serampore, the latter being charged under ss. $\frac{379}{511}$ of the Penal Code, and the former under s. 408 in respect of the tickets, and under ss. $\frac{379}{109}$. They were convicted on the above charges on the 8th September, 1910, and the petitioner was sentenced to five months' and six months' rigorous imprisonment, respectively, on the charges against him, the sentences being directed to run concurrently. He appealed from the said order to the Additional Sessions Judge of Hooghly who, by his judgment, dated the 20th December, 1910, upheld the conviction and sentences. The Judge found that the petitioner had directed Aswini to obtain a refund of the two fares and instructed him how he should set about it, disbelieving the latter's story as to the disposal of the tickets in his confession. The petitioner then moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mukerjee, for the petitioner
Mr. Sinha and *Babu Joy Gopal Ghose*, for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate to show cause why the conviction of, and sentences on, the petitioner, Kali Das Chuckerbutty, should not be set aside or why a retrial should not be ordered, or why the sentences should not be reduced or otherwise modified on the ground that there had been misjoinder of charges, and that the petitioner is, if guilty, only liable to be punished for a single offence.

The facts deposed to and found by the lower Courts are that the petitioner, being a ticket collector on the E. I. Railway at Sheoraphuli, was seen to hand two third class tickets to a man named Aswini Kumar Seal just after the arrival of a train from Haripal to Sheoraphuli. These tickets had been used and collected from passengers by the petitioner. A travelling inspector who was deputed to look out for frauds in connection with used tickets, which had been frequent of late, followed Aswini Kumar Seal and returned with him in the same train to Haripal. There he saw and heard Aswini

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claim a refund on the two tickets which he said had been purchased by his aunt in the morning and had not been used. To make the story more plausible he had left the station with the other passengers and had returned again after a few minutes. On arrest he made a clean breast of the matter, and stated that he had been employed by his friend, the petitioner, to carry out this fraud.

He was then taken back to Sheoraphuli, and it is said that the present petitioner also admitted his guilt and begged for mercy when confronted with Aswini. He has since retracted his confession and pleads that the Station Authorities were persons in authority within the meaning of the Evidence Act, and their presence and pressure induced him to confess. This may be conceded. On these facts the petitioner was charged with criminal breach of trust under section 408 and with abetment of cheating under section 420 read with section 109 of the Penal Code, and tried at the same trial with Aswini Kumar Seal who was charged with attempt at cheating under section 420 read with section 511 of the Penal Code.

We have heard Mr. Sinha showing cause against the Rule and the learned vakil in support, and we do not think that this case falls within the rule laid down in *Subrahmania Ayyar* v. *King-Emperor* (1). The case of *Parmeshwar Lal* v. *Emperor* (2) which has been cited to us, as the case most nearly approaching this one in the books, is clearly distinguishable. There the accused cashed the cheques and not only completed the breach of trust but proceeded to cheat his masters by a wholly independent act, not necessarily connected with the embezzlement of the money. Had he conspired with the railway clerk, handed over the cheques drawn by his masters to him and induced him to make over the goods to him and the balance of the money, the case would have borne some resemblance to this one, and there might have been no misjoinder.

Here the transaction is clearly one, and falls within the purview of section 239. The two clauses of section 239 are

(1) (1901) I. L. R. 25 Mad. 61. (2) (1909) 13 C. W. N. 1089.

not mutually exclusive. A induces B to cheat. B attempts to cheat in consequence. A and B may clearly be tried together for abetment of, and attempt at, cheating respectively. If in the course of the same transaction A commits the separate offence of criminal breach of trust, in furtherance of the conspiracy to cheat, A may clearly be charged with that offence at the same trial.

The only other question is whether, having regard to the necessary hypothesis that the offences are committed in the same transaction, separate sentences can be passed against the petitioner on each charge. It appears to us that they can. In this case it is true that the cheating could not be carried out without the prior misappropriation of the tickets, but the conversion of the misappropriated tickets might have been made in some other way than by inducing the second accused to commit cheating. The eventual method of conversion is not the misappropriation, it is only evidence of the way the misappropriation was rendered successful. Having elected to make the conversion in this way the petitioner's conduct becomes part of the same transaction, but he commits two different offences within the meaning of section 239 and he can be separately punished for those offences.

The most that can be said in a case of this kind, when the transaction is continuing with the dishonest purpose which originally made it criminal, is that the Court exercises a wise discretion in making the sentences run concurrently, as was done in this case. We are fortified in this view by the fact that illustrations (e) and (h) of section 454 of the old Code were omitted in the present Code and its immediate predecessor after the decision in *Re Noujan* (1), where it was held that "section 454 (now 235) taken with its illustrations forbids 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."

(1) (1874) 7 Mad. H. C. R. 375.

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That was the case of abducting a child with the intent of dishonestly taking its ornaments under section 369 of the Indian Penal Code, and would raise a similar question to the disputed point whether separate punishment can be inflicted for house-breaking with intent to commit theft and for theft in a dwelling-house consequent upon such house-breaking. That, however, is also a different question to the one which arises in this case, and is governed by section 71 of the Indian Penal Code.

As the sentences have been made to run concurrently, we need not discuss the point further, especially as the whole amount of punishment awarded could have been given under either section.

The Rule is accordingly discharged and the petitioner will surrender to his bail to serve out the rest of his sentence.

Rule discharged.

E. H. M.

ORIGINAL CIVIL.

Before Mr. Justice Stephen.

1911

Feb. 9.

NABINCHANDRA SAHA PARAMANICK

v.

KRISHNA BARANA DASI.*

Vendor and Purchaser - Contract of sale—Breach by vendor—Loss of bargain—Liability of vendor—Transfer of Property Act (IV of 1882) s. 55 (1) (g)—Measure of damage.

The owners of certain immovable property, which was under a mortgage, entered into a contract for the sale of the property, but subsequently declined to complete the sale, on the ground of the existence of the mortgage. Thereafter the property was acquired, under the Land Acquisition Act, by the Local Government; and the compensation paid to the owners, including the statutory allowance of 15 per cent., far exceeded the contract price.

* Original Civil Suit No. 384 of 1910.