Privy Council Appeal No. 65 *of* 1937

Bengal Appeals Nos. 43 & 44 *of* 1936

Babulal Choukhani - - - - - - *Appellant*

v.

The King-Emperor - - - - - - *Respondent*

Sailendra Nath Mukherjee - - - - - *Appellant*

v.

The King-Emperor - - - - - - *Respondent*

Consolidated Appeals

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY, 1938.

Present at the Hearing:

LORD WRIGHT.
LORD ALNESS.
LORD ROMER.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* LORD WRIGHT.]

These two consolidated appeals depend substantially on the same issues of fact and involve the same questions of law. They were brought by special leave of His Majesty in Council in order to obtain a decision on the true effect of section 239 (*d*) of the Criminal Procedure Code, 1898, which provides that persons who are accused of different offences committed in the course of the same transaction may be charged and tried together. The question has been whether the correctness of the joinder which depends on the sameness of the transaction is to be determined by looking at the accusation or by looking at the result of the trial. Certain subsidiary questions have also been raised as affecting the validity of the trial and conviction. These are not matters which would justify special leave to appeal being granted upon the principles which this Board have adopted in guiding this discretion in criminal matters, and should not have been brought before this Board but as the questions have been raised, their Lordships will in due course shortly deal with them.

The first appellant, Babulal Choukhani, has extensive business interests, including the ownership and operation under managers of the Bharat Lakhsmi Cinema at Calcutta. He was convicted of theft of electricity under section 39 of the Indian Electricity Act, 1910, and sentenced to fine and imprisonment. His conviction by the Magistrate for conspiracy was quashed on appeal by the High Court. The second appellant was convicted of aiding and abetting the first appellant, the conviction given against him for conspiracy being likewise quashed. The separate thefts could only be treated in a case like this as forming part of the same transaction if they were unified as being overt acts done in pursuance of a conspiracy.

The facts can be very shortly stated. The Calcutta Electric Supply Corporation were in the year 1934 concerned to find a discrepancy between units of energy generated and those accounted for by sales in excess of what would normally be experienced by the regular causes of wastage, such as transmission or conversion losses. Special inspectors of meters were appointed and in due course evidence of an extensive system of thieving was obtained. The method adopted was to tamper with the meters at consumer's premises in such a way as to conceal the fact of tampering. The actual work was done by skilled operatives, but their activities were organised by a number of individuals who approached the consumers and generally agreed to share with the consumers the amounts saved by the fraudulent alteration of the meter readings. They then employed and made terms with the actual tamperers. The second appellant was one of the organisers. The thefts which were charged against the first appellant were at his cinema. The facts as to the actual theft were held to be proved both by the Magistrate and by the High Court. It is not now suggested there was no evidence to justify the findings on these matters.

In order to examine the main question of law which was raised, viz. the construction of section 239 (*d*) of the Code of Civil Procedure, it is necessary to trace in the briefest manner possible the course of the proceedings. On the 17th November, 1934, the Electricity Corporation having obtained sufficient *prima facie* materials to justify that course, lodged a complaint before the Chief Presidency Magistrate at Calcutta that their electricity was being stolen, with particular reference to the first appellant's cinema and also to another cinema with which he was not connected. The police investigated the matter and on the 29th January, 1935, made a report to the Chief Presidency Magistrate naming 23 persons, including the two appellants, and accusing them of being parties to a criminal conspiracy at Calcutta, Howrah and other places in British India to commit theft of the Corporation's electric energy and of dishonestly abstracting and using electricity in pursuance of that conspiracy at the two cinemas and other places in British India. Mr. Sinha, the Chief Presidency Magistrate, who commenced the hearing on the 29th January, 1935, framed charges against 12

persons, of the 23 persons accused, after hearing evidence in chief from 36 persons, the most important witnesses being three approvers. The charges framed against the first appellant were as follows:—(1) jointly with the other accused, including the second appellant:—

> "That you between January, 1934, and 20th January, 1935, at 2 and 2/1 Chittaranjan Avenue (Bharat Laksmi Picture House), Jupiter Cinema, 66/2 Beadon Street, Sealdah Hotel, 225 Harrison Road and other places in Calcutta, Howrah and 24 Perganas, along with Krishna Chandra Shome, Bholanath Chatterjee, Hardwar Singh, Aswini Kumar Panja, Nanilal Ghosh alias Noni Mistri, Putu, Md. Abdul Azim and Bhudeb Chandra Seth and others were parties to a criminal conspiracy to commit theft (dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited by tampering with meters at the premises of the consumers and that in pursuance of the said conspiracy, theft of electric energy was in fact committed at Bharat Laksmi Picture House, Jupiter Cinema and other places and thereby committed an offence punishable under Section 120B of the Indian Penal Code read with Section 39 of the Indian Electricity Act and Section 379 of the Indian Penal Code and within the cognizance of this Court."

(2) against the first appellant alone:—

> "That you between April, 1934, and 16th January, 1935, at Bharat Laksmi Picture House situate at 2 and 2/1 Chittaranjan Avenue, Police Station Jorashanko, Calcutta, committed theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited and thereby committed an offence punishable under Section 39 of the Indian Electricity Act (IX of 1910) read with Section 379 of the Indian Penal Code and within the cognizance of this Court."

Against the second appellant there was in addition to the joint charge against all the accused, two other charges of which one is here material. This was as follows:—

> "That you between April, 1934 and 16th January, 1935, at Bharat Laxmi Picture House abetted Babulal Chowkhani in the commission of the offence of theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited which offence was committed in consequence of your abetment and you have thereby committed an offence punishable under Section 109 of the Indian Penal Code read with Section 39 of the Indian Electricity Act (IX of 1910) and Section 379 of the Indian Penal Code and within the cognizance of this Court."

These charges having been framed in accordance with section 254 of the Code of Criminal Procedure, the trial proceeded before the Chief Presidency Magistrate, who heard a great mass of evidence both for the prosecution and the defence. On the 6th June, 1935, he delivered judgment, finding that the charge of conspiracy was proved against seven of the accused, including the two appellants, and acquitted the others. He found the charge of theft proved against the first appellant and sentenced him to one year's rigorous imprisonment and a fine of Rs.1,000 on that charge. He passed no separate sentence on the charge of conspiracy. The Chief Presidency Magistrate found the second appellant guilty of conspiracy and of abetment of theft, and sentenced him to two years' rigorous imprisonment on the latter charge. He passed no separate sentence on the charge of conspiracy. On a further charge in respect of a cinema other than that

of the first appellant, the Jupiter Cinema, the second appellant was acquitted. It is not relevant to discuss what was the result in respect of the other persons who were convicted.

Both appellants appealed to the High Court. On the 10th July, 1936, the judgment of the Court was delivered by Derbyshire C.J. and Costello J. So far as concerned the charge of conspiracy the High Court held that the conspiracy charge was not proved and in that respect reversed the decision of the Magistrate and set aside the convictions on that count. The only conspiracy charged was one single conspiracy between all the accused, consumers, organisers and tamperers. The Court held that it might well be that all the organisers and tamperers were acting in concert in such a manner as to constitute a criminal conspiracy within the meaning of section 120B of the Indian Penal Code, but that there was no evidence to justify the finding that all the consumers were acting in concert with all the organisers and tamperers so as to constitute the single embracing conspiracy which was charged. The charge could not be established merely because of an agreement between each consumer and the particular persons who carried out the tampering operations in concert with him and for his individual benefit. But the Court held on the construction they adopted of section 239 (*d*) of the Code of Criminal Procedure that the trial as a whole was not vitiated by reason of misjoinder of persons and charges. They held that there was no reason to hold that the Magistrate in framing the charges was acting with any evil motive but found that he was *bona fide* of opinion that the evidence given in chief by the prosecution before him at the stage of the case when he was framing the charges *prima facie* warranted him in charging the conspiracy as he did. However mistaken his view might turn out to have been, he was judicially exercising the discretion given him by section 239 (*d*) in framing the charges as directed by section 234. They accordingly decided that the proceedings involved no breach of the provisions of section 239 (*d*) and that they were not illegal or invalid. The Court further held that the form of the charges had caused no prejudice to the accused but that the "Chief Presidency Magistrate had dealt with the evidence against each individual accused carefully and conscientiously." This conclusion of the Court had reference to the specific charges of overt acts of theft or abetting. The Court finally said:—

> "If we had the slightest reason to suppose that any of the convicted persons had been unfairly dealt with by reason of the whole body of them having been charged with conspiracy we should have felt it our duty to quash the proceedings. It is fortunate for the prosecution that although we have given the closest attention and consideration to the points urged by the learned Advocates appearing for the Appellants, we have not come to any such conclusion. The pieces of evidence which Mr. Carden Noad said would not have been admissible but for the existence of the charge of conspiracy, and also those pieces of evidence which Mr. Carden Noad declared would not be admitted in any event, none of these things have, in our opinion, had any influence adverse to the interests of the convicted persons or any of them."

This conclusion is one which their Lordships after a careful consideration of the evidence find no reason to dissent from. They also agree with the views of the High Court on the construction and effect of section 239 (*d*) and on its application in the present case. Before explaining in detail their reasons for so agreeing, their Lordships observe that they will reserve for later discussion certain minor objections urged on behalf of the appellants, which have been likewise rejected by the High Court, rightly as their Lordships think.

It has been taken as settled law on all sides throughout these proceedings that the infringement of section 239 (*d*) would if made out constitute an illegality, as distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in *Subramania's* case 28 I.A. 257, as contrasted with the result of an irregularity, as to which *Abdul Rahman's* case 54 I.A. 96 is an authority. Their Lordships will assume that this is so, without thinking it here necessary to discuss the precise scope of what was decided in *Subramania's* case, because in their understanding of section 239 (*d*) that question does not arise.

The Code of Criminal Procedure contains a collection of statutory rules. Section 5 (1) provides that all offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to its provisions. The language of the Code is therefore conclusive and must be construed according to ordinary principles, so as to give effect to the plain meaning of the language used. No doubt in the case of an ambiguity, that meaning must be preferred which is more in accord with justice and convenience, but in general the words used read in their context must prevail.

Section 239 falls within Chapter XIX, which deals with the form of charges and the joinder of charges. Under the latter division fall sections 233 to 240 inclusive. Section 233 states the general rule that for every distinct offence of which any person is accused there shall be a separate charge and each charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239. Sections 234, 235 and 236 deal with the joinder and trial of different offences against the same accused. Section 239 deals with the joinder in one charge and trial of several persons. Section 239 (*d*) if written out in full would read thus:—

> "The persons accused of different offences committed in the course of the same transaction may be charged and tried together, and the provisions contained in the former part of this Chapter (that is in regard to the form and joinder of charges) shall so far as may be apply to all such charges.".

The clause is expressly an exception from section 233 and enables a plurality of offences to be dealt with in the same trial. But it does not import either expressly or by implication the limitation set out in section 234 according to which not more than three offences of the same kind committed within the space of 12 months can be tried together or the limitation contained in section 235 (1), under which more offences than one committed by the same person can only

be tried together if they are in one series of acts so connected together as to form the same transaction, in which case there is no specific limit of number. Nor is there any limit of number of offences specified in section 239 (*d*). The one and only limitation there is that the accusation should be of offences "committed in the course of the same transaction." Whatever scope of connotation may be included in the words "the same transaction," it is enough for the present case to say that if several persons conspire to commit offences, and commit overt acts in pursuance of the conspiracy (a circumstance which makes the act of one the act of each and all the conspirators) these acts are committed in the course of the same transaction, which embraces the conspiracy and the acts done under it. The common concert and agreement which constitute the conspiracy, serve to unify the acts done in pursuance of it. So far seems clear; but the point of difficulty which has been strenuously argued in this appeal relates to the point of time in the proceedings at which the condition prescribed by the clause must be fulfilled. To put it more exactly, is it enough if the conspiracy is to be found in the accusation or must it be found in the eventual result of the trial? Is the relevant point of time that of the accusation, or that of the eventual result? For the former view there is an unbroken series of authorities in the Indian Courts, but the matter has not until now come before the Judicial Committee and must now be decided by them. It is a question of principle, or, perhaps more correctly, construction.

Their Lordships are of opinion that the view adopted in India is correct, as the High Court have held in the present case. The clause deals with three matters, accusation, charge, trial. It says nothing about verdict. The condition is expressed in the words "persons accused of different offences, &c." It does not say "rightly accused" or "accused and convicted." It is on the basis of what appears on the face of the accusation that the Court may proceed to charge and try. The accusation is necessarily anterior to the exercise of the discretion to charge and try. These are stages subsequent to the accusation. This view is strengthened by reference to section 254 which states the duty of the Magistrate in warrant cases, such as the cases in question here. The duty so stated is that the Magistrate, when evidence has been taken or at any previous stage of the case if of opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XXI, which he is competent to try and which in his opinion could be adequately punished by him, should frame in writing a charge against the accused. Similarly in the case of trials in the High Court or Courts of Session charges will be framed on the accusation. It is true that the opinion of the Magistrate may be wrong in law as to there being a same transaction, or the evidence which led him to think *primâ facie* that this condition existed, may be insufficient or may eventually be falsified. It would result in any such events that the prosecution is enabled at the

trial to join separate offences contrary to the terms of sections 234 and 235. And it has been affirmed that improper advantage is taken of section 239 (*d*) so as to bring into one proceeding a great number of accused and a great multiplicity of offences, with serious hardship and injustice to the accused. If that were indeed the result of the section, as the High Court seem to be apprehensive it might be, it would be much to be regretted and might well be a ground for an amendment of the section by the Legislature, if such practice prevailed notwithstanding the warning of the High Court and their determination to see that accused are not being unfairly dealt with and to prevent any procedure by which cases which should be comparatively short and simple become unwieldily, complicated and lengthy. But even so that can be no ground why the Court should misconstrue the section. Indeed it is difficult to think that such apprehensions are justified. It must be hoped, and indeed assumed, that Magistrates will exercise their discretion fairly and honestly. Such is the implied condition of the exercise of every discretionary power. If they do not, or if they go wrong in fact or in law, then the accused has *primâ facie* a right of recourse to the Superior Courts by way of appeal or revision. The passage already quoted from the judgment of the High Court shows how vigilant and resolute that Court would be to see that the accused were not prejudiced or embarrassed by an improper joinder of charges or of persons accused. These safeguards may well have appeared to the Legislature to be sufficient. It may seem paradoxical that the prosecution should have the advantage of joining different offences and different accused simply because the allegation of a conspiracy seemed to the Magistrate to be *primâ facie* justified, whereas at the trial the allegation breaks down. But the charges have to be framed, for better or worse, at an early stage of the proceedings. It would be paradoxical if no one could tell till the end of the trial whether the trial was legal or illegal.

Their Lordships decide the question on what they regard as the plain meaning of the language used. In doing so they are in agreement not merely with the careful judgment of the High Court in the present cases, but with the various authorities which are so fully quoted in that judgment that it is not necessary here to quote them again. Mr. Carden Noad has however contended that at least in the majority of the cases cited the conspiracy was established in the result of the trial so that the charge was justified by the eventual verdict and it was immaterial whether accusation or verdict were taken as the crucial stage. That is true in some of the cases, but does not affect the construction of the section, which in one of the earliest, *King-Emperior* v. *Datto* I.L.R. 30 Bom. 49 in 1905, was clearly and correctly explained in the following words of Batty J. at p. 54:—

> " Section 239 admits of the joint trial when more persons than one are accused of different offences committed in the same transaction. It suffices for the purpose of justifying a joint trial that the accusation alleges the offences committed by each accused to have been committed in the same transaction.".

To refer to only one later case, *Gopal Raghunath* v. *King-Emperor* I.L.R. 53 Bom. 344 in 1928, the charge of conspiracy failed, but the convictions for specific acts were upheld. Baker J. at p. 351 said:—

> "So long as the accusation against all the accused persons in that they carried out a single scheme by successive acts, the necessary ingredients of a charge regarding the one transaction would be fulfilled, and the fact that the conspiracy was not established, would not vitiate the trial as regards those acts for which the evidence was sufficient for proof.".

Mr. Carden Noad further cited certain cases which he said supported his construction of section 239 (*d*) because in these cases convictions were set aside as not satisfying the requirements of the Code as to joinder of persons and offences, though, as he contends, the Courts might have acted upon section 239 (*d*). It is not necessary to refer to these cases in detail, because they seem to be essentially distinguishable in that no conspiracy or joint transaction was charged. To take one instance, in *Gobind Koeri* v. *King-Emperor,* I.L.R. 29 Cal, 385, a boy was charged and convicted of placing clods on a railway line and two other boys at the same trial were charged and convicted of rescuing him from legal custody. The convictions were quashed because the three offences were not charged as committed in the same transaction and the placing of the clods and the rescue were on their face separate offences.

In their Lordships' judgment the appeals fail in so far as they are based upon section 239 (*d*). This is the ground on which it seems that special leave to appeal was granted. But in any case the further grounds argued on behalf of the appellants are not such as in their Lordships' opinion justify in a criminal matter recourse to the jurisdiction of the Judicial Committee. The nature of such grounds have often been stated. In *Abdul Rahman* v. *King-Emperor* (*supra*) it was contended that inasmuch as special leave to appeal had been granted the ordinary rules limiting the exercise of this jurisdiction ceased to apply. The Judicial Committee rejected that contention, following *Arnold* v. *King-Emperor,* 41 I.A. 149, where the language of *Dillet's* case, 12 App. Cas. 459, was adopted and repeated:—

> "The rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.".

In other words the Judicial Committee is not a Court of Criminal Appeal. But as the further objections raised by the appellants have been argued, their Lordships will shortly deal with them.

It was argued that the specific offence was wrongly charged under section 39 of the Electricity Act, and could only legally be charged under section 44 (*c*) of the Act, which makes it an offence (*inter alia*) wilfully or fraudulently to alter the index of a meter or prevent a meter from duly

registering. No doubt a charge could have been preferred under that section, if the condition of the jurisdiction of the Magistrate that an order should be made by the Local Government consenting to the initiation of the proceedings (section 196A, Code of Criminal Procedure), had been satisfied, as in fact it was not. But the existence of section 44 (*c*) does not prevent the charge which was made under section 39 from being properly made. Section 39 is in fact the major offence. That offence was clearly established, because the user of electric current without the intention of paying is beyond question a dishonest user. That is all that is required under section 39 which creates a statutory theft sufficiently established against whoever dishonestly abstracts, consumes or uses the energy. The technical rules applicable to proving the theft of a chattel do not apply to proof of this special offence.

Then it was contended that the charge of theft was not properly framed because it alleged a multiplicity of offences between April, 1934, and the 16th January, 1935, whereas the offences did not constitute a single continuing offence; they were separate offences committed on particular dates and should have been separately charged. Their Lordships feel that the form of the charge was most irregular and regrettable and one which should be avoided. But they cannot regard this objection as one which in the circumstances of this case should receive effect, especially because they agree with the High Court that no injustice was inflicted on the appellants. The specific offences of which they were accused were satisfactorily proved by competent evidence, corroborated in all necessary respects. There was no miscarriage of justice. In addition the irregularity was such as could be, and was, cured under sections 225 and 537 by the finding that the accused had not been prejudiced. A minor point that the charge of theft was bad as not alleging that the thefts were committed in pursuance of the conspiracy and therefore not alleging a same transaction, is without substance. The specific charge was clearly to be read with the conspiracy charge.

In the result their Lordships are of opinion that the points taken on the appeals on behalf of the appellants fail. and that the judgment of the High Court was right and should be affirmed. Both appeals should be dismissed.

They will humbly so advise His Majesty.

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