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Reg. v. Govindas Haridas.

*Charge—Amendment of charge—Prisoner prejudiced on merits—Act XVIII. of 1862, S.c. 1.*

The Court, under Sec. 1 of the Criminal Law Amendment Act (XVIII. of 1862), has power to order the amendment of a charge involving a change in the ownership of stolen property, provided such amendment does not prejudice the accused in his defence upon the merits.

Where it is doubtful whether an amendment of a charge will or will not prejudice the accused in his defence upon the merits, the amendment ought not to be made.

Where the accused was charged with receiving stolen goods from the wife of the prosecutor, the property in the goods being laid in the prosecutor, and the charges were amended by laying the property in the prosecutor jointly with his mother, it was held that such amendment ought not to have been made.

At the fifth Criminal Sessions of 1869, before WESTROP, J., and a common jury, the prisoner was charged: (1) "with having on the 10<sup>th</sup> of September 1869, in a certain building used as a human dwelling, committed theft of one gold nose-ring, three gold finger-rings, one silver waist-chain, and Rs. 150 in money, of the moveable property of Bim Javhara against the form, &c.; (2) with having dishonestly received certain stolen property, (to wit) one gold nose-ring, &c., of the moveable property of the said Bim Javhara, he, the said prisoner, having reason to believe the same to be stolen property against the form, &c.; (3) with having dishonestly misappropriated and converted to his own use certain property, (to wit) one gold nose ring, &c., of the moveable property of the said Bim Javhara, against the form, &c.

*Ferguson* for the prosecution.

*Barton* for the defence.

The prosecutor, Bim Javhara, stated that he was a begging Brahman, living at a place called Chunam Kiln, with his wife and mother, and that the prisoner was also a beggar. The prosecutor kept the ornaments and money in question in a box in his house, where he saw them the day before they were stolen. Of this box sometimes he, sometimes his mother, kept the key. The property in the box was the

joint property of himself and his mother, Gavrabai. They purchased the property with money obtained by begging. The property was purchased out of their joint funds.

On this evidence being given, *Ferguson* applied to the Court to allow the charges to be amended, by inserting the name of the mother of the prosecutor as joint owner with him of the property. *WESTROP, J.*, allowed the amendment to be made, but expressed doubt as to his authority to make it, and as to its being possible to do so without prejudice to the defence; and he accordingly reserved the question for the Full Court, whether, under the special circumstances of this case, it was proper to make such an amendment. The case then proceeded, when it appeared that on the day the property was taken, the prosecutor and his mother were absent at a fair begging; that the wife of the prosecutor was left at home; and the prosecutor upon his return found the box open, and the property it contained gone. Radha, the wife of the prosecutor, a young woman about 15 years old, stated that she had known the prisoner for about three months; that on the day in question he came to her room, and asked her to take the property out of the box, and go with him to Nassick; that she refused; that he then told her to stand outside, when he would open the box, and she did so; the prisoner opened the box, and took the property, and subsequently gave Radha Rs. 4, and told her to go to the railway-station at Byculla, and promised to follow her. Radha did so, and waited four hours at the railway-station, and when the prisoner did not come, returned home crying. She further stated that the prisoner threatened her. Another witness, however, *Jamnadas Jallo*, said that he saw Radha give the prisoner a white bag full of something, but did not know what it contained, and heard her say to the prisoner "burn this bag."

The prisoner on the same day took the property, and deposited it with four different persons, to keep for him, but did not meet Radha at the railway-station.

The jury found the prisoner guilty upon second head of charge.

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The point reserved came on for argument before COUTH C.J., and WESTROPP, J., on the 11<sup>th</sup> December 1869.

*Barton*, who appeared as *amicus curiæ*, stated that the defence he had been instructed to put forward was that the prisoner had received the property from the wife of the prosecutor innocently, and that, as the wife could not be convicted of stealing the property of her husband, the prisoner could not be convicted of receiving that property from her, knowing it to have been stolen; that by the amendment his line of defence was necessarily altered, and that the prisoner was consequently prejudiced in his defence upon the merits.

*Ferguson*, in support of the conviction:—The Court had power to make the amendment. The Acts that regulated the procedure in criminal trials in the High Courts in India, before Act XVI. of 1852 were Act IX. of Geo. IV., c. 74 and Act XXXI. of 1838. Both of these Acts are silent as to the power of the Courts to allow amendments in indictments. In England, before the passing of Lord Campbell's Act, 14 and 15 Vict., c. 100, the Courts had a very limited power of making amendments, and it was found that criminals often escaped in consequence. It was determined therefore to enlarge the power of the Courts in that respect. The preamble to 14 and 15 Vict., c. 100, runs thus:—"whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case, and whereas such technical strictness may safely be relaxed in many instances, and whereas a failure of justice often takes place on trials by reason of variances between the statement in the indictment and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence." Sec. 1 then enumerates the amendments that may be made, amongst which is mentioned an amendment in the ownership of any property named or described in the indictment. That Act was passed in 1851.

In 1852 the Indian Act was passed, and the preamble of it is almost identical with that of Lord Campbell's Act. The enacting section, however, does not enumerate the amendments that may be made; but enacts generally that "whenever there shall appear to be any variance between the statement in the indictment and the evidence it shall be lawful for the Court, if it shall consider such variance not material to the merits of the case, and the defendant cannot be prejudiced thereby in his defence upon the merits, to order the indictment to be amended." Reading this section by the light afforded by Section I of Lord Campbell's Act, it is evident that the Court had power under it to order an amendment in the ownership of stolen property. The words of Sec. I of Act XVIII. of 1862, under which the amendment in this case was made, are at least as wide as those of Sec. I of Act XVI. of 1852, for which it has been substituted.

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The prisoner here was not prejudiced in his defence. He would properly have been convicted under the circumstances even if the prosecutor and his wife were governed by English law: *Reg. v. Deer* (a). It is immaterial that the adultery had not actually been committed, if there was intent to elope for the purpose of committing it: *Reg. v. Fullarton*, (b) *Reg. v. Featherstone* (c), *Reg. v. Thompson* (d), *Reg. v. Tollet* (e). It was differently laid down in *Reg. v. Clarke* (f); but that case must be taken to be overruled. (Couch, C.J.:—In ordinary cases when the wife parts with the property of her husband, she is presumed to do so with his consent. The presumption is rebutted in case of adultery or intended adultery.) The husband cannot be presumed to consent to his wife parting with his property under these circumstances, Lord Campbell says, in *Reg. v. Featherstone*, that when a woman becomes an adulteress she determines her quality of wife. This is the rule of English law; but even if adultery, or the intention to commit it, were not proved here, the prisoner would have been properly convicted, for the prosecutor is a Hindû, and there is not

(a) Leigh and Cave Cr. Ca. 240

(b) 6 Cox Cr. Ca. 159.

(c) *Ibid* 376. (d) 1 Den. Cr. Ca. 549.

(e) Carr, and Man. 112.

(f) 1 Mood Cr. Ca. 379, in *vol.*

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between him and his wife that identity of interest which exists between an English husband and his wife: *Reg. v. Khatagai* (g). That was the case of a Muhammadan, but the rule in the case of Hindus is, I submit, the same. WESTROPP, J., mentioned a case in the time of Sir Charles Jackson (1854-55), where the Court refused to allow an amendment in the ownership of property.\* It is said that the Court should be sparing in allowing amendments in criminal cases, but the reason of that rule—the objection of the Courts to interfere with the presentment of the Grand Jury upon oath—does not exist here; *Reg. v. Hevins* (h).

COTTEY, C. J.;—The terms of Sec. 1 of Act XVIII. of 1862 are, in my opinion, sufficiently extensive to allow the Court to make such an amendment as was made in this case; they are as extensive as they can well be. The section says that; “Whenever on the trial of any indictment for an offence there shall appear to be a variance between any statement in such indictment and the evidence offered in proof thereof, it shall be lawful for the Court before which the trial shall be heard \* \* \* to order such indictment to be amended according to the proof.” The section of the English Act which has been referred to as corresponding with this section enumerates a great variety of amendments which it is lawful for the Court to make, and in my opinion the language of the Indian Act is wide enough to include all those amendments, and possibly goes further than the English Act.

The section in question, however, enacts that the requisite amendment shall be made if the Court shall consider that by the amendment the person indicted will not be prejudiced in his defence on the merits. What we have then to determine is, whether, looking at the nature of the case which was made at the trial against the prisoner, the evidence that was given, and the line of defence set up by him through his counsel, the prisoner has been prejudiced in his defence on the merits; and it appears to me from what I have heard

(g) 6 Bom. H. C. Rep. Cr. Ca. 9.

(h) 9 Car. and P. 780, per Coleridge J.

\*The reporter has not been able to find a report of this case.

during the argument, and from what my brother Westropp has told me, that the amendment may have had such an effect on the line of defence adopted, and that the prisoner may have been prejudiced. If that is possible, or if the case against the prisoner, in consequence of the amendment, has been presented to the jury in a different manner from that in which otherwise it would have been presented to them, I think the amendment ought not to have been made. It is difficult in some cases to say whether an amendment will prejudice a prisoner in his defence upon the merits; in some it is clear that an amendment will not have the effect; in others it is equally clear that it will; and where it is doubtful whether an amendment will or will not prejudice the prisoner, the leaning of the Court should be in favour of the prisoner. In this case, as I have said the prisoner may have been prejudiced, and I think the amendment ought not to have been made.

WESTROPP, J.:—I am of the same opinion. I think there is a great deal in what Mr. Ferguson has argued, that the Act of 1862 cannot be considered as giving less power of amendment than the English Act, 14 and 15 Viet., c. 100, and therefore that generally speaking, an amendment may be made as to the ownership of property. What he has said as to the difference of relation existing between a Muhamadan or Hindu wife and her husband, and an English wife and her husband, may also be deserving of serious consideration. There are cases, even under English law, in which a man can be found guilty of receiving stolen goods which he has taken from the hands of the wife of the owner. But I cannot help thinking that Dr. Barton, the learned Counsel for the prisoner, was embarrassed in his line of defence by the amendment that was made. He thought he had to meet the case of the accused receiving from the wife the property of her husband, in which in all cases, whether English or native, there is more or less of difficulty in procuring a conviction; whereas, it turned out to be the property of the husband and his mother, a fact which did not in any way appear upon the depositions made before the Magistrate

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in the Police Office and which came, therefore, by surprise as well upon the Counsel for the prisoner as upon the Counsel for the prosecution. Whether having regard to the very peculiar nature of the evidence given here, the fact of the alteration of the allegation as to the ownership of the property, may not have prejudiced the prisoner in his defence, it is at least very difficult to say; and where there is a doubt on that point, the prisoner is entitled to the benefit of it.

I do not sufficient recollect the case I alluded to as having occurred before Sir Charles Jackson, to be able to state whether he thought that the accused there would have been prejudiced by the amendment upon the special facts of that case, or whether he went upon the broad ground that any alteration of the statement of ownership would prejudice the prisoner.

COURN, C. J.:—I think it right to add that there was another course open to the prosecution besides that of asking for an amendment. The prisoner might have been acquitted upon the original charge, and charged anew before the Magistrate according to the facts. There need not have been a failure of justice.

*Prisoner discharged.*