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On the merits, I am satisfied that the appellant has a better case. Admittedly the party in possession was defendant No. 1, the purchaser. If for want of notice, or by reason of prior possession, defendant No. 1 was not held liable to plaintiff's claim, there seems to be no valid reason for holding defendant No. 3 liable, as he was admittedly not in possession. In the suit brought by Chandru this defendant was expressly exempted from all liability. I would, therefore, reverse the decree of the District Court, and dismiss the claim as against the appellant with costs.

CROWE, J.:—I concur.

Decree reversed and claim dismissed as against appellant.

APPELLATE CRIMINAL.

Before Mr. Justice Ranade and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* ANANT PURANIK.*

1900. July 19.

Criminal Procedure Code (Act V of 1898), *Secs.* 196 *and* 235—*Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.*

The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1860).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

Held, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (Act XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

Per FULTON, J.:—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under sec

* Criminal Appeal, No. 128 of 1900.

tion 122 of the Penal Code, and by the same speech also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

Queen-Empress v. *Karigowda*[1] and *In re Nagarji*[2] distinguished.

APPEAL by the Local Government under section 417 of the Code of Criminal Procedure (Act V of 1898) from an order of acquittal passed by R. Knight, Sessions Judge of Sátára.

The accused was originally charged under section 116 of the Indian Penal Code (Act XLV of 1860) with abetment of dacoity under the following circumstances as stated by the Sessions Judge:—

"In June, 1900, a Máng named Dasrya was arrested by the police for complicity in certain dacoities. From him the authorities learnt that a certain Bráhmin had been moving about among the Mángs in this district endeavouring to collect men to "march to Pratapgad, loot the Mahábaleshvar treasury, slaughter the Sáheb *log*, loot other treasuries, go to Poona, loot the jail and release Tilak.

"Dasrya named another Máng, Fakira, as cognizant of the plot. He was questioned, and corroborated Dasrya, and in his possession were found a number of *dhotis* and other garments much superior to the common apparel of his class. These, he said, the Bráhmin had given him.

"At this time the accused, who happened to be in Sátára, saw Fakira in police custody. Thereon he went to the Sheristedár of the District Superintendent of Police, an acquaintance of his, and asked him to recover from Fakira the money due for certain clothes which he, accused, had purchased for him from Kasturchand, a trader of this city. The Sheristedár mentioned this to the Chief Constable, and the identity of the accused with the Bráhmin conspirator was immediately established.

"Inquiries were made of Kasturchand, from whose books it was ascertained that the accused had purchased of him garments

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.

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similar to those found with Fakira, and the accused was then taken by the police and placed before the District Magistrate and the District Superintendent, in whose presence he made a certain statement. Further investigation was made and some small corroboration of the Máng's story was obtained, and accused was eventually committed for trial on a charge of abetment of dacoity."

In the course of the trial the Assistant Sessions Judge of Sátára added an alternative charge under section 511 of the Indian Penal Code, and convicted the accused of either instigating or attempting to commit dacoity under sections 395, 116 and 511 of the Code and sentenced him to eighteen months' rigorous imprisonment.

On appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to collect men with the intention of waging war against the Queen; that the accused ought, therefore, to have been charged under section 122 of the Indian Penal Code; and that as the charge could not be framed under section 122 for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), he ought not to have been prosecuted at all. The Sessions Judge, therefore, quashed the conviction and sentence, and acquitted the accused.

Against this order of acquittal, the Local Government appealed to the High Court.

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader), for the Crown.

B. A. Bhagvat, for the accused.

RANADE, J. :—This is an appeal by Government under section 417 against the decision of the Sessions Judge of Sátára, who reversed the conviction and sentence passed on the accused by the Sessions Judge under sections 395, 116 or 511 of the Indian Penal Code. The accused had been originally committed for trial on a charge under section 116 of having instigated certain persons, Mángs and Rámoshis principally, to commit dacoity under section 395. In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511, and convicted the accused of either instigation or attempting

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to commit dacoity under sections 395, 116 or 511, Indian Penal Code. In appeal the Sessions Judge acquitted the accused after reversing the conviction on the charges named above, as he was of opinion that the real charge which should have been brought against the accused was an attempt to commit an offence under section 122; and if for want of the sanction of Government required by section 196, Criminal Procedure Code, 1898, this charge could not be framed, the accused should not have been brought to trial at all, or, at the most, should have been bound over to keep the peace under Chapter VIII of the Code. The Government Pleader has appealed against this order of acquittal, and contended that the Sessions Judge was in error in holding that the offence proved was under section 122 only. He contended that though the accused might have been charged under section 122 if the sanction of Government had been obtained, it did not follow that he could not be charged for the offence under sections 395, 116 or 511, for which there was direct evidence. The immediate and direct purpose for which the accused attempted to collect and enlist Mángs and Rámoshis was that of plundering the treasury, and though the ultimate object might have been of a political character this did not change the real nature of the offence actually committed, which must be determined not by the remote and possible consequences, but by what was presumably the immediate, natural and probable consequence of the criminal intention entertained by the accused. This immediate intention was one which fell within sections 391, 116 or 511, and that, therefore, the Sessions Judge was in error in reversing the conviction and sentence passed by the Assistant Sessions Judge.

The only point for consideration in this appeal is whether there was any error in the procedure followed by the Committing Magistrate and the Assistant Sessions Judge when the one committed the accused and the other inquired into the minor charge under sections 395, 116 or 511 because, owing to the want of sanction under section 196, Criminal Procedure Code, a charge under section 122 could not be made or inquired into. It appears from the evidence of the District Magistrate that the idea of a prosecution under section 122, Indian Penal Code, was given up by him after correspondence with Government, as he

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found from the police inquiry that there was no evidence to substantiate the charge under section 122. The District Magistrate as representing the Government had certainly full discretion in the matter of selecting the particular charges under which Government chose to prosecute the accused, and if he elected for want of evidence to give up the charge under section 122 it did not necessarily follow that no prosecution should be instituted on the minor charges, which the evidence might prove, and for which no special sanction was necessary. This was the view adopted by the Assistant Sessions Judge, before whom the accused's pleader had contended that it was not open to the Committing Magistrate to split up the graver offence and charge accused for the minor offence, because the graver charge could not be inquired into for want of the sanction of Government. This contention assumes that the evidence was sufficient to prove that the accused not only tried to instigate dacoity by collecting men, but that he intended that the men were to be collected to overthrow the British rule and establish his own rule like Shivaji, and slaughter all the Europeans, &c. This assumption, however, could not be made under the circumstances stated by the District Magistrate, according to whom there was no evidence to bear out the charge under section 122. If the Government was not so satisfied, it was not for the Committing Magistrate to decline to frame any charge or for the Assistant Sessions Judge to refuse to inquire into the charges on which the commitment was made. The whole question, therefore, has not been properly approached by the Sessions Judge when he set aside the Assistant Session Judge's conviction; because, in his opinion, the evidence warranted a charge under section 122, and he held that if such a charge could not be brought for want of sanction, no trial should have taken place on the minor charges, for which no sanction was necessary, and which the evidence was sufficient to prove. The Sessions Judge virtually has taken on himself the function of setting his own judgment against the opinion of Government, in a matter which by law belongs properly to Government, which alone under section 196 has the right to grant or refuse the sanction. If in the exercise of that discretion it refused for want of evidence to make the order, it was not for

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the Sessions Judge to hold that it should have made the order or drop the prosecution altogether. Section 196 is not the only section which requires sanction. The preceding section 195 also provides that certain offences shall not be taken cognizance of by any Court, unless previous sanction for such prosecution is granted by the Court before which those offences were committed. The Court before which the offences are committed, have a discretion in the matter of giving or refusing sanction, and if the Court refuses such sanction, it does not follow that no complaints should be inquired into of the minor offences involved in the particular offences for which sanction is needed. For instance, personation is an offence under sections 170 and 171, in respect of which no sanction is necessary. It is also involved in section 205, which relates to false personation for the purpose of a suit. An offence under section 205 requires sanction before it can be inquired into by any Court. Supposing sanction is not granted under section 205 by the Court before which false personation for purposes of a suit was committed, it surely does not take away the authority of the Courts to proceed under sections 170 or 171 if the evidence warranted such a conviction. This same remark would apply to sections 206 to 210, which relate to fraudulent claims made or prosecuted in Civil Courts. If, for want of sanction, these offences could not be inquired into, it does not follow that the fraud should remain unpunished, if it could be proved under other sections of the Code, such as cheating, cheating by personation, &c. (sections 417 to 423) for which offences no sanction is necessary. The same remark applies to prosecutions under section 211 which relate to false charges of offences. If these could not be inquired into for want of sanction, it does not follow that the offender cannot be punished for giving false information (section 188) or defamation (section 500) if these minor charges could be proved. This was the principle of the decision passed by this Court in *Queen-Empress* v. *Karigowda*[1]. The decision in *In re Nagarji*[2] was referred to in the argument, and some expressions used by the Judges who decided this last case no doubt favoured the contention that it is an invasion of

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.

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the law to treat an aggravated as an ordinary offence and thus introduce a different jurisdiction and a lower scale of punishment. But the point decided in that case had relation only to the privilege of pleaders. The analogy of witnesses was applied to them, and it was ruled that as witnesses cannot be prosecuted for defamation though they might be tried for perjury if they give false evidence, the pleader could not be punished for defamation if he exceeds his privilege. The cases decided in *Empress* v. *Abdool Karim*[1] and *Ramanund* v. *Koylash*[2] have no bearing on the present case. They only rule that a Magistrate cannot assume jurisdiction by splitting up a charge so as to disregard that portion of the charge which is beyond his jurisdiction. There was no such splitting up of charges in this case. The Magistrate would only obtain jurisdiction to try under section 122 when the Government granted the sanction under section 196. In the absence of such sanction the minor charge was probably inquired into. It appears to me that the Sessions Judge has laid too much stress upon the so-called confession made by the accused, which confession was held inadmissible in evidence by the Assistant Sessions Judge. Granting that the confession was admissible and did disclose an intention of an offence under section 122, it was surely open to Government to see if that intention was of a character which it could take into account. The Judge himself admits that the accused Puranik was crazy, and his intention to wage war with the help of Mángs and Rámoshis was ridiculous. He characterizes the design as insane and yet he seems to think that the intention of a crazy man must determine the charge that should be made; and if that particular charge could not be made, because of the insanity and insanity of the design of a crazy person, there should be no prosecution. The Sessions Judge's reference by way of authority made to pages 463 to 467 of Mayne's work seems obviously to be without any bearing. Mr. Mayne's remark relates to the distinction between riots which are mere disturbances of the peace and riots which may develop into the waging of war. In such cases intention must be the sole criterion. It

(1) (1878) 4 Cal., 18. (2) (1885) 11 Cal., 236.

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is otherwise where, as in the present case, the craziness and insanity made it impossible to assign any other design than that of looting, which in such cases was not a mere incident but the principal object of the attempted offence.

The possible difficulty created by the committal being under sections 395 and 116 in a case in which no overt act was committed by anybody, was removed by the alternate charge under section 511 added by the Assistant Judge—*Queen-Empress* v. *Kalyan Singh*(1); *In re MacCrea*(2). To constitute such an attempt it was not necessary that any overt act should be committed by the persons invited to join, but seeing that the accused admittedly gave rich clothes to the Mángs to induce them to collect men, his act cannot be said to have been a mere preparation though it might not be an instigation when nobody was induced to join by reason of the solicitation—*Queen-Empress* v. *Dhundi*(3). Section 511 does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act. Taking this view I feel satisfied that the Assistant Sessions Judge was correct in the procedure followed by him, and that the Sessions Judge was in error in reversing that decision. It is not necessary to consider the question of fact, as both the Assistant Sessions Judge and the Sessions Judge agree in finding that the accused did instigate or abet the committing of dacoity. The sentence passed by the Assistant Sessions Judge must, therefore, be restored, and I order accordingly that the accused be sentenced to rigorous imprisonment for the unexpired portion of the original sentence passed upon him.

FULTON, J.:—Before dealing with the facts I will briefly refer to the questions of law on which the Sessions Court's decision turned. If it is true that the accused asked certain persons to collect men to overturn the Government and to loot the treasuries it seems to me that he abetted not only an offence under section 122, but also the abetment of dacoity (*vide* explanation 4 of section 108, Indian Penal Code). I cannot follow the reasoning on which the Sessions Judge held that as the accused was not

(1) (1894) 16 All., 409. (2) (1893) 15 All., 173.

(3) (1886) 8 All., 304.

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prosecuted for the former offence he could not be convicted of the latter. We are bound by the provisions of the Code of Criminal Procedure, and the second clause of section 235 appears exactly to meet a case like the one under consideration. "If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the persons accused of them may be charged with and tried at one trial for each of such offences." That seems so explicit as to leave little room for argument. Here if the accused abetted an offence under section 122, and by the same speech also abetted the offence of abetment of dacoity, he could be tried for each of these offences according to the provisions of section 235, but as that section is controlled as regards the offence against the State by the provisions of section 196, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried. I do not think the decision in *Queen-Empress* v. *Karigowda*[1] has any bearing on the point in question. Some of the arguments in *In re Nagarji*[2] do support the view taken by the Sessions Judge, but with all deference to the learned Judges who decided that case I cannot but think that some of the dicta which were not really necessary for its determination go beyond the provisions of the Code.

The question whether a witness who makes defamatory statements in the witness-box can be convicted of defamation is one that has led to a great deal of difficulty, and various Courts have explained in different ways the grounds on which the practice of not convicting of defamation in such cases is believed to rest. In these circumstances I do not think we can safely apply to other classes of offences the arguments used in *In re Nagarji*[2]. The law on the subject of major and minor offences committed in the same transaction appears to me to be very correctly explained by Mr. Justice Candy in *Queen-Empress* v. *Gundya*[3]. Sections 346 and 347 prescribe the procedure to be followed by Magistrates in cases where the evidence indicates the commission of an offence which ought to be tried in a higher Court,

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.
(3) (1889) 13 Bom., 502.

but do not touch the matter now under consideration, in which there is no inherent insufficiency of jurisdiction in the Court, but merely a prohibition to its exercise without sanction. In these circumstances I agree with Mr. Justice Ranade in thinking that the refusal of Government to prosecute under section 122, Indian Penal Code, did not affect the accused's liability to punishment under other sections.

The next question to be determined is the section, if any, under which the alleged acts are punishable. The accused is said to have asked people to collect Mángs and Rámoshis for the purpose of making war on the Government and looting treasuries. Such an incitement I think is an instigation to instigate the commission of dacoity.

I am inclined to agree with the Judge in holding that an instigation to wage war against the Government includes an instigation to dacoity, as such war necessarily includes robbery; but there is no occasion to determine this point, as here it is said there was a distinct instigation to collect people to loot treasuries, which could only be effected by dacoity. There might or might not be a political object in view, but the offence of looting the treasury by means of a gang of more than five men and by overcoming the guards would certainly be dacoity. I cannot understand why the Sessions Judge says "a man does not in ordinary parlance, nor in any of the illustrations to section 108, instigate an offence which he is about to commit as a principal, nor is such an interpretation within the meaning of the term 'abetment.'" If A asks B and others to come with him to commit dacoity, he seems to me to instigate those men to dacoity, just as much as if he asks them to go under some other leader. Similarly if he asks B to ask C and others to join in dacoity he abets the abetment of dacoity. It would be a strange doctrine to hold that a person who did his best to bring about a dacoity by asking other people to join him, or employing an agent to collect them, could not be punished for abetment. The mere fact that no illustration of this kind is given under section 108, Indian Penal Code, does not alter the meaning of the word "instigate" in section 107. I agree with the Sessions Judge that section 511 is inapplicable in this case.

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The most the accused did was to make unsuccessful efforts to collect men and to buy some articles of clothing apparently for the reward or decoration of his followers. Apart from the difficulty alluded to by the Sessions Judge of attempting to commit an offence like dacoity which may itself consist merely in an attempt to commit robbery, I do not think the acts of the accused amounted to an attempt. In many cases it is hard to indicate the precise point at which a preparation to commit a crime becomes an attempt to commit it; and it is still more difficult to define in general terms the difference between a preparation and an attempt. In some cases the distinction is clear. If A merely buys a stick in order to beat B no one would think of saying that he attempted to beat B. If he ran at B with the stick, but was seized by C, probably most people would say that he did attempt to beat him. But there might be many intermediate cases in which there would be a difference of opinion whether the acts amounted to an attempt or merely constituted a preparation. It is unnecessary to enter into any discussion on this subject, as here I think it is clear that the acts alleged did not amount to an attempt, and that the introduction of section 511 into the case was superfluous.

The third question which I have to consider is one of fact to which Mr. Bhagvat almost exclusively confined his argument. He contended that the individual acts of abetment were not proved. But as the general intentions of the accused are proved conclusively both by his confession to Mr. Dodgson and by numerous witnesses, there seems no good reason for disbelieving the act of abetment to dacoity deposed to by Mahadu, whose statement is corroborated by the evidence of Dattatraya and to some extent by Ganesh. War against the Government would naturally be initiated by attacks on treasuries. There are other acts proved which might also perhaps constitute acts of abetment; but as this one act seems established, there is no need to discuss the rest. The accused ought to have been distinctly charged with the separate acts for which he was being tried instead of with one general charge of instigating various persons to commit dacoities; but he was defended by able pleaders who can have had no difficulty in finding out from the committal proceedings the offences alleged against him, and does not, therefore, appear to

have been prejudiced by the irregularity. I would now reverse the acquittal by the Sessions Judge, and would convict the accused under section 116, Indian Penal Code; and I would restore the sentence of eighteen months' rigorous imprisonment imposed by the Assistant Sessions Judge, and direct that the prisoner undergo the unexpired portion thereof.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

MURLIDHAR (ORIGINAL DEFENDANT-APPLICANT), APPELLANT, v. PARSHARAM (ORIGINAL PLAINTIFF-OPPONENT), RESPONDENT.*

1900. *June* 28.

Mortgage—Redemption—Decree for redemption—Failure of mortgagor to pay the sum ordered by the decree—Rights of mortgagee on such failure—Transfer of Property Act (*IV of* 1882), *Secs.* 92 *and* 93.

In a suit by a mortgagor for redemption of a mortgage dated 17th March, 1891, a decree was passed in 1897 allowing him to redeem on payment of the mortgage-debt within a year from the date of the decree; but the decree did not contain any provision for foreclosure or sale in default of payment on the due date.

The plaintiff having made default, the defendant applied to the Court for an order absolute for foreclosure or sale, under section 93 of the Transfer of Property Act (IV of 1882). His application was rejected on the ground that as the decree did not contain any clause for foreclosure or sale, section 93 of the Act was not applicable.

Held, in second appeal, that the defendant (mortgagee) was entitled to the remedy given by section 93 although the decree was not drawn up as prescribed by section 92. The omission of the Court to draw up the proper decree under section 92 did not deprive the mortgagee of the relief provided by section 93.

SECOND appeal from the decision of Ráo Bahádur D. N. Ranadive, Additional First Class Subordinate Judge, A. P., at Násik.

On the 30th January, 1897, the plaintiff obtained a decree for the redemption of a mortgage dated the 17th March, 1891.

The decree provided as follows:—

"The Court decrees plaintiff's claim for redemption of the mortgaged house and possession of title-deeds as prayed for, on

* Second Appeal, No. 661 of 1899.