

Where an appeal is presented from a decree directing a sale of property in dispute in a suit, then the only course is to take such steps as will secure that, by stay or otherwise, no detriment shall be suffered by the appellant in case the appeal succeeds.

No effectual steps in this direction were taken on behalf of the minors, and the result is that in the absence of fraud, collusion or any other disqualifying circumstance the title acquired under the Court-sale cannot be successfully impugned.

Therefore the decree should be confirmed with costs. Two sets to be allowed.

*Decree confirmed.*

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## CRIMINAL APPELLATE.

*Before Mr. Justice Russell and Mr. Justice Aston : on reference before  
Mr. Justice Batty.*

EMPEROR v. JETHALAL HURLOCHAND.\*

*Criminal Procedure Code (Act V of 1898), sections 233, 239—Joint trial of  
different accused—Receiving stolen property at different times and from  
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A theft was committed of certain property including ornaments. S was one of the persons who received the stolen property from the thieves. S disposed of the property to several persons, and being indebted to J he gave a portion of the property to J in satisfaction of his debt. K was found to have in his possession a portion of the property identified as stolen in the same theft, but there was nothing to show when he received it and from whom. Under these circumstances the three persons S, J and K were tried together at one trial on charges of receiving stolen property knowing it to be stolen :

*Held* by RUSSELL and BATTY, JJ., that the three offences against the three accused S, J and K were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Criminal Procedure Code, and that the trial of the three accused together was in contravention of the provisions of section 233 of the Code and was therefore illegal.

*Per* BATTY, J. :—“The offence punishable under section 414 of the Indian Penal Code is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by

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the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time when both offences are committed."

"The words of section 239 of the Criminal Procedure, 1898, are, to say the least of it, ambiguous, if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction. The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction."

"The inevitable result appears to be that the proceedings of the Magistrate were illegal and a nullity . . . There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither appeal against acquittal nor acquittal to reverse, and the question whether the accused should now be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with a prosecution."

*Subrahmanya Ayyar v. King-Emperor*<sup>(1)</sup> followed.

APPEAL under section 417 of the Criminal Procedure Code (Act V of 1898), by the Government of Bombay, from the order of acquittal passed by S. Padamji, Additional Sessions Judge of Ahmedabad, in appeal from conviction and sentence recorded by C. V. Vernon, 1st Class Magistrate of Panch Mahals.

On the 22nd August 1903 a theft was committed by certain Bhils at Baroda, of property valued at Rs. 7,000. The Bhils disposed of the property to several persons, of whom Sahebodin (accused No. 1) was one. On about the 8th September 1903 Sahebodin disposed of the property to Chhotalal and Mansukh: and gave a portion of the property to Jethalal (accused No. 2) in satisfaction of the debt of Rs. 1,185, which was due by Sahebodin to Jethalal, and which was the balance due on an account which had been running 10 or 12 years. A further portion of the property, identified as stolen, was found hidden in Kila's (accused No. 3) field in an earthen pot: and Kila's explanation regarding the same was that it was placed there with his knowledge and consent by a Bata. Beyond this statement of Kila there was no evidence in the case to show how he came by that property.

The three persons, Sahebodin (No. 1), Jethalal (No. 2) and Kila (No. 3), were under these circumstances tried together at one trial by the 1st Class Magistrate of Panch Mahals for the offences under

(1) (1901) 25 Mad. 61.

sections 411 and 414 of the Indian Penal Code. At the trial the charge under section 414 of the Indian Penal Code was withdrawn, "as section 411 contained the gist of the charge against" the accused.

The three accused were convicted of the offence charged, and Sahebodin was sentenced to suffer two years' rigorous imprisonment; Jethalal was ordered to undergo three months' simple imprisonment and to pay a fine of Rs. 1,000; while the sentence that was passed upon Kila was one month's rigorous imprisonment.

Jethalal alone appealed against the conviction and sentence, and the Additional Sessions Judge of Ahmedabad reversed both on a consideration of the merits of the case against the accused and acquitted him.

The Government of Bombay appealed to the High Court, under section 417 of the Criminal Procedure Code (Act V of 1898), against this order of acquittal.

In the High Court it was contended on behalf of the accused that his trial, which took place along with his co-accused Sahebodin and Kila, was irregular and illegal.

The appeal was first argued before a bench composed of Russell and Aston, JJ., but their Lordships, having differed in opinion, delivered the following judgments.

RUSSELL, J. :—The second accused in this case, Jethalal Harlochand, was convicted by the Magistrate, 1st Class, Panch Mahals, of receiving stolen property knowing the same to be stolen (section 411 of Indian Penal Code) and sentenced to three months' simple imprisonment and Rs. 1,000 fine or, in default, further simple imprisonment for three months.

The second accused appealed and on the 9th June 1904 the Sessions Judge of Ahmedabad ordered that the accused be discharged and the fine, if paid, refunded.

The Government of Bombay appealed from this order and the case was fully argued before us by Mr. Branson for the accused and the Advocate-General and Government Pleader for the Crown.

Before dealing with the arguments it is necessary to state some preliminary facts.

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In the month of August 1903 a large quantity of property comprising gold and pearl ornaments, diamond ornaments, silver ornaments and pots and clothes were stolen from the house of one Khanderao Ganesh of Baroda City. The value of the said property was Rs. 7,000 or thereabouts. The complainant at once gave a list of the stolen articles to the Baroda Police. Inquiries were made in Baroda and British Territory and in October the Chief Constable of Kalol got information that the thieves and property were in Kalol, but owing, it is said, to delay in getting detailed particulars from Baroda he was unable to carry on a regular investigation till December. In that month the Baroda Police and complainant joined him and the result of their inquiries was the production of property roughly valued at Rs. 1,700 and in the institution of proceedings against both thieves and three receivers who were Sahebodin (No. 1), Jethalal (accused herein) (No. 2) and Kila Ranchhod (No. 3) in this case. On the night of 1st March 1904 the whole of this property including an acquittance (Exhibit Z) was stolen from the Police guard.

The first point raised by Mr. Branson for Jethalal was that, having regard to section 239 of the Criminal Procedure Code, these three alleged receivers should not have been charged and tried jointly. It should be here mentioned that all the three accused were charged with offences under section 411 and section 414 of the Indian Penal Code, but the Magistrate at the beginning of his judgment says:—"As section 411 contains the gist of the charge against them section 414 is *withdrawn*." I now read *in extenso* the charges framed against the three accused at pages 270, 271 and 272 of the Record. From these charges it will be seen: (1) that Sahebodin (No. 1) is charged (a) during the latter part of 1903 at Goraj or elsewhere in Kalol having in his possession certain of the property specified with guilty knowledge, (b) with assisting in disposing of the same to three Banias Chhotalal, Mansukh and Jethalal, (c) with a previous conviction for a similar offence; (2) Jethalal is charged that he between August and December 1903 at Kalol received from Sahebodin and retained certain of the property with guilty knowledge; (3) Kila is charged with in the latter part of 1903 having retained in his possession a silk border which he had reason to believe was stolen.

From these it appears that there were the following transactions:—

(1) As to Saheb-din:

(a) having in his possession certain of the property at Goraj or elsewhere;

(b) assisting in disposing of the same:

(i) to Chhotalal,

(ii) to Mansukh,

(iii) to Jethalal;

(c) a previous conviction for a similar offence.

(2) As to Jethalal having received from Saheb-din at Kalol and retained certain of the property.

(3) As to Kila having retained property (a *sári*) at a place not specified.

It is important to observe here that the charge under section 414 of the Indian Penal Code of assisting [in concealing stolen property was withdrawn by the Magistrate. Therefore the only charge we have to deal with is receiving stolen property with guilty knowledge. This being so it is clear from the above charges that the different receivings of the stolen property are all different transactions. Each alleged receiving took place at a different time and a different place. Again as to the property received, Saheb-din received more of it than Jethalal is said to have received, while Kila received property with which neither of the other two had anything whatever to do. Neither of the accused is charged with abetting the other, as in fact they could not be.

I fail to see how the different offences charged against the three accused can be said to have been committed in "the same transaction." The transactions were all different. The decision of *Queen-Empress v. Fakirapa*<sup>(1)</sup> is directly applicable. There it was held that if in any case either the accused are likely to be bewildered in their defence by having to meet many disconnected charges or the prospect of a fair trial is likely to be endangered by the production of a mass of evidence directed to many different matters and tending by its mere accumulation

(1) (1890) 15 Bom. 491.

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to induce an undue suspicion against the accused, then the propriety of combining the charges may well be questioned.

I shall proceed to show how accused 2 must have been bewildered in his defence and his fair trial endangered by the production of a mass of evidence directed to many different matters with which he had nothing to do. In the first place, what possible connection was there between Jethalal and accused No. 3? You have only to read the Magistrate's judgment as to No. 3 (which I do at page 20 of his judgment) to see that the case of No. 3 has nothing whatever to do with that against No. 2 or No. 1. Again, how could it possibly be relevant to the case against No. 2 that No. 1 had been ten years before convicted of having received stolen property? No. 2 when he was cross-examined by the Magistrate denied knowledge of No. 1's conviction. Even if he had known of it could it be relevant against him? Suppose that No. 1 was giving evidence against No. 2, could Counsel for the prosecution have been allowed to ask No. 1 if he had been so previously convicted?

Again, what possible evidence against No. 2 do the following witnesses give, *viz.*, Nos. 4, 5, 6, 7, 8, 10, 11? Absolutely none. It is true that Nos. 5 and 6 were questioned in cross-examination as to Jethalal's being at the Police gate but neither of them know anything about it.

But the most grievous injustice was done to Jethalal by the fact that his pleader had no opportunity of cross-examining Sahebodin. Jethalal was the only accused who appeared by a pleader, Sahebodin and Kila being unrepresented by any pleader. Jethalal's case was that he had had an account with Sahebodin which was adjusted in April 1903 when Rs. 1,185 were found due by Sahebodin to Jethalal. That on or about the 9th September Exhibit 29 (1) was written by Jethalal which showed that that account was squared by the ornaments being taken over in satisfaction of the debt (Rs. 51 being remitted). That on the 19th September Jethalal gave Exhibit Z to Sahebodin which was an acquittance. In his statement to the Magistrate in writing Jethalal sets forth his case at length. That statement has been received in evidence and filed in the Record and must be taken into consideration. Sahebodin's case as disclosed in his cross-

examination by the Magistrate was that the ornaments were not taken by Jethalal in satisfaction of debt, but on the contrary he himself paid cash to Jethalal at Halol and that he had received the cash from the sale of cotton, &c., not a very likely story when we have regard to the pecuniary position of Sahebodin as disclosed in the evidence. Sahebodin's statement to the Magistrate is nothing like a confession; on the contrary, it is wholly self-exculpatory and looking at Jethalal's case is absolutely condemnatory thereof. Jethalal by the course pursued at the trial has had no opportunity of cross-examining Sahebodin on his statements and in my opinion has not had anything like a fair trial. The Government Pleader in his reply was driven to suggest that questions put to Sahebodin by the Court at the instance of Jethalal's pleader should be deemed equivalent to a cross-examination of Sahebodin. I cannot agree with this suggestion. On this question of mis-joinder of charges I would refer to *Kumudini Kanta Guba v. The Queen-Empress* <sup>(1)</sup>. In my opinion the above combination of charges is not a matter which can be cured by the application of section 537 of the Code of Criminal Procedure: see *Subramania Iyer v. King-Emperor* <sup>(2)</sup>, and although the point was not taken in the Court below it is competent for this Court to entertain it. For no consent of the accused or his pleader will cure any want of jurisdiction or any irregularity in the trial which may have affected the result so as to cause a failure of justice: see *The Queen v. Bholanath Sen* <sup>(3)</sup>, and compare *The Queen v. Bishonath Pal* <sup>(4)</sup>.

Inasmuch however as after the careful discussion of the case against accused No. 2 it is undesirable to decide this case on a technical objection I proceed to deal shortly with the merits, and upon these I am not prepared to find No. 2 guilty of an offence under section 411. In the first place I am satisfied that in April 1903 there was an adjustment between him and Sahebodin when Rs. 1,185 were found to be due to him. The

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(1) (1900) 28 Cal. 104.

(2) (1876) 2 Cal. 23.

(3) (1901) 28 I. A. 257; 25 Mad. 61:

(4) (1869) 3 Beng. L. R. A. J. Cr. 2.

3 Bom. L. R. 540.

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book containing the adjustment has been handed back to Jethalal which would not, I apprehend, have been done if the prosecution were satisfied that that entry was a false one. This then establishes the foundation of Jethalal's case. The next fact which I think is proved is that witness No. 9, Ishwar Ranchhod, was given some pearls of Jethalal's by Gordhan Master to be valued. Ishwar is a witness for the prosecution, and I see no foundation for suggesting that he is not a witness to be believed. Gordhan who is called for the defence corroborates Ishwar. Again, the witness Dalpat Naran for the defence (No. 30) who formed one of the Panch to value the ornaments in question of Jethalal gives evidence which I see no reason to disbelieve. Dalpat says the other member of the Panch was Premanand. Premanand was called for the defence (No. 32). Now this witness disappeared and a warrant had to be issued for his arrest. He has a house next to the Chief Constable although he says he does not live there. In examination he says "I do not remember that Jethalal received any ornaments from Sahebodin. I do not remember any discussion with Dalpat. I have no information as to whether there was such discussion or not. I did not know at all what evidence was expected from me in the case." The question occurs to me on this:—If so why did he abscond? I have no hesitation, having read this witness' evidence over carefully, in saying that in my opinion this witness has been "got at" by some person or persons on the part of the prosecution. If this be so, what inference can we draw except that the accused No. 2 has not been fairly dealt with?

In my opinion, therefore, there is no sufficient reason to disbelieve accused No. 2's story that he did get the ornaments valued before he took them over in satisfaction of his debt. If this is so, is it likely that the accused, if he believed or had reason to believe the things he took over were stolen property, would have consulted five persons as to what the value of the things was? It seems to me that such conduct is utterly inconsistent with his believing or having reason to believe that the things were stolen.

The next point to consider is whether Jethalal, if he had the guilty knowledge imputed to him, would have been likely to

prepare Exhibit 29 (1) which on its face shows that the ornaments in detail were in his possession. I cannot conceive how he could have done so if he had the guilty knowledge. Then it is said if this was a genuine and innocent transaction why does it not appear in Jethalal's books. No doubt if it had so appeared it would have gone further to establish his innocence, but the absence of this entry from the books does not to my mind outweigh the consideration I have above referred to. As to the discovery of 29 (1) I see nothing incredible in it nor do I think that any inference is to be drawn against Jethalal by the fact of his advocate handing it in a sealed packet to the Magistrate at the time he did with the request that it should not for the present be disclosed to anybody. Looking at the way in which the witness Premanand was tampered with I should say it was a wise precaution not to let the prosecution see Exhibit 29 (1), otherwise they might have attempted to discount it. I cannot believe in the theory put forward by the Government Pleader that 29 (1) was fabricated in jail by accused and handed to Gordhan there.

Mr. Branson made a great point of the statements of the Chief Constable as to the alleged denial by Jethalal of possession of the ornaments and of all knowledge of accused No. 1. The complainant has also given a quantity of evidence as to Jethalal's denial of the possession of the anklet (E). I am not disposed to place implicit reliance on the Chief Constable on this point nor on the complainant. It all depends upon how the questions were exactly put to the accused. If he had taken the ornaments over from Sahebodin in the way his case is he did, I can understand his at first admitting that they were stolen property.

Lastly, we must have regard to the words of section 411 as to which it has been held that it is not sufficient to show that the accused person was careless, or had reason to suspect that the property was stolen, or that he did not make sufficient inquiry to ascertain whether it had been honestly acquired: per Melvill J. in *Empress v. Rango Timaji* <sup>(1)</sup>. Upon the whole, therefore, I am of opinion that the order of the Sessions Judge for the acquittal of Jethalal should be confirmed. For, looking at the

(1) (1880) 6 Bom. 402.

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opinion I have formed on the merits of the case, it would in my opinion be a useless waste of public time and money for the accused to be sent for a fresh trial. The present case has been hanging over his head for 16 months and I am clearly of opinion that he should not be tried again.

Aston, J.—This appeal was argued on Thursday afternoon last and Mr. Branson for the respondent, Jethalal accused No. 2, had taken some time in replying for the respondent. It was next day when in resuming his address he took the point that the accused No. 2 ought to have been tried separately, and urged that Jethalal was prejudiced in his defence because he was not able to call accused No. 1, Sahebodin, as a witness. No such point had been raised in either of the lower Courts. Although Sahebodin denied that he had disposed of any of the property to Jethalal, it was the case for the prosecution that the property recovered by the Police from Jethalal had been received by him from Sahebodin, and this was the account which Jethalal himself relied on at his trial and it was part of case for the prosecution which the Magistrate believed. Yet it has been contended at this late stage that Jethalal was prejudiced because he could not *cross-examine* Sahebodin.

As to the legal merits of the objection. It is clear from the record that each of the accused was charged under both sections 411 and 414 of the Indian Penal Code and stood so charged up to when the Magistrate was writing his judgment. The Magistrate in his judgment does say that the charges under section 414 are withdrawn, but it is clear that this was merely an inaccurate mode of expressing his intention to suspend inquiry into the charges under section 414 as in his opinion the gist of the charge against the accused was contained in section 411.

The record shows that the case and evidence for the prosecution were that Sahebodin accused 1 had dishonestly received stolen property and disposed of it to Jethalal accused 2 who in turn had dishonestly received such property from Sahebodin knowing or having reason to believe it to be stolen. Such charges can be tried together: see section 239, Criminal Procedure Code, and *Emperor v. Keshav Krishna* <sup>(1)</sup>. In this view it is not neces-

(1) (1904) 6 Bom L. R. 361.

sary for me to discuss the wider question whether the word "transaction" being a word of wide significance, the various receipts and disposals of the proceeds of one and the same theft are not ramifications of the same transaction. But I will add here that looking to the very late stage at which this objection to the joinder of charges has been raised, I would if I had arrived at a different conclusion on the above point have held that the accused No. 2 Jethalal should be retried. For this is an appeal by the Crown to which the right of appeal from an order of acquittal is given by the Legislature and we are asked to reverse the Additional Sessions Judge's appellate order of acquittal because it was made in a perfunctory inquiry on arbitrary grounds. To concede the contention of the respondent's Counsel that to order a retrial would be persecution of the respondent would be to render nugatory the right of appeal accorded to the Crown by the Legislature and I am unable to adopt the view that the Crown in suing for justice in this Court is seeking what will amount to persecution of the respondent who made no objection in either of the lower Courts to the joinder of charges and adduced all his evidence to answer the charges.

The evidence in the case has been reviewed and discussed by the First Class Magistrate, Mr. Vernon, in a conspicuously fair and painstaking judgment. It has been dealt with in an unsatisfactory manner in the perfunctory judgment recorded by the Additional Sessions Judge who has entirely failed to grasp the leading features in the case.

The First Class Magistrate has put out of consideration part of the prosecution evidence which, when the whole evidence is weighed together, seems to me to be of more weight than the Magistrate attached to it. In so doing he seems to have been influenced by the fact that at a late stage a narrative prepared for the defence was put in by the defence accusing the Chief Constable of trying to obtain a bribe from the accused Jethalal.

If it were necessary to decide in this case how much truth or appearance of truth there is in that accusation, then as witnesses, including Police witnesses, ought to be able to count upon fair treatment in a Court of justice, as well as the accused, the question would arise whether looking to the stage at which that

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accusation was made, the mode in which it was brought forward, and the flimsy materials on which the accusation rests, that accusation is not one which in common fairness may be safely disregarded in this case.

But it appears to me quite unnecessary to lengthen this judgment by discussing a number of side issues raised at the hearing, or to rest my conclusions upon the Police evidence in this case. For apart from the Police evidence as to the conduct of Jethalal there is material sufficient in my opinion to enable me to come to a clear conclusion. Therefore in order to shorten my judgment I will confine attention to certain features in the case which in my opinion are established beyond room for question or doubt.

First of all it is known that in August 1903 there was a theft of property of considerable value—about Rs. 7,000—at the house of complainant who is a Magistrate.

Sahebdin, accused 1 in this case, stands convicted of having dishonestly received part of the stolen property from the thieves, and we know that out of the portion he received he passed on a part to accused 2 Jethalal including a silver anklet called Exhibit G early in September 1903. We have that date because Jethalal says he gave the acquittance of which Exhibit Z is a copy (dated 19th September 1903). Some days after he received the property with which he is concerned including Exhibit G from Sahebdin, and thus we have recent possession of stolen property traced to Jethalal. From such recent possession of stolen property a Court may presume that Jethalal received it knowing it to be stolen unless Jethalal can account for his possession satisfactorily—section 114, Evidence Act, Ill.(a)—the inference arising of course from the absence of satisfactory explanation and not from the mere recent possession of stolen property.

Now, is this possession of Jethalal of property recently stolen satisfactorily accounted for, or do the facts and circumstances proved in the case show beyond room for reasonable doubt that he received or retained this property, dishonestly knowing or having reason to believe it to be stolen property. Of course there is a difference between reason to suspect and reason to believe: but the sections 411 and 414 say nothing about reason to suspect, whilst they do draw a distinction between knowledge and reason

to believe. It is not incumbent on the prosecution to prove knowledge or mental conviction, that is the actual state of mind of the accused if the prosecution can prove facts constituting a reason to believe, but when possession of recently stolen property is not satisfactorily accounted for even knowledge that the property was stolen and not mere reason to believe it was stolen may be presumed by the Court. That is the law as contained in section 114 of the Evidence Act.

The words "reason to believe" are quite plain and I will not attempt to paraphrase them.

[After reviewing the rest of the evidence the judgment continues :—]

The conclusion I have come to on consideration of all the evidence is that the respondent Jethalal has not satisfactorily accounted for his possession of property recently stolen when he obtained possession of it, and that on the contrary the facts and circumstances proved in the case show that his conduct throughout was that of a man who knew or had reason to believe that the articles in question including the anklet Exhibit G were stolen property when he received or retained them.

I would for the above reasons set aside the appellate acquittal and restore the conviction and sentence recorded by the First Class Magistrate.

Owing to the above difference in opinion, the case was referred to Batty, J., under the provisions of section 378 of the Criminal Procedure Code (Act V of 1898).

Rao Bahadur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown.

*Branson* (with him *G. S. Rao*) for the accused.

BATTY, J.—In this case the accused, Jethalal Harlochand, was tried with two other persons, Sahebudin Jevdir and Kila Ranchhod, on charges of receiving stolen property knowing it to be stolen; and was convicted by a First Class Magistrate. The Sessions Judge, however, reversed the conviction on appeal. And the Bombay Government have appealed against the order of acquittal recorded by the Sessions Judge. The Bench which heard the appeal having been divided in opinion, the case has

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now been referred to me under section 378 of the Code of Criminal Procedure.

The facts of the case for the Crown are fully stated in the judgment recorded by the Magistrate who convicted the accused, and are summarized in the judgments recorded by the Sessions Judge and by the Members of the Bench which heard the appeal made by Government in this Court. It will suffice therefore to note here such salient facts in the case as gave rise to the difference of opinion on which this reference was made.

These facts as stated by the Magistrate, who tried the case, are as follows:—

On 22nd August 1903 three Bhils committed a theft at Baroda. Sahebodin, the first accused, was one out of several receivers. He disposed of part of what he had received to two Banias, Chhotalal and Mansuk and to a barber Ishwar Purshotam.

On 8th September Sahebodin delivered to the present accused, Jethalal, a further portion of what he had received and the Magistrate states that there is not much doubt that Jethalal did receive the things for a debt of Rs. 1,185.

The third accused, Killa Ranchhod, produced a further portion, but a very small portion, of the property identified as stolen. There is nothing in the Magistrate's judgment to show when he received it or from whom. It is not suggested that he obtained it from Jethalal or from Sahebodin. His own statement that it was obtained from a Bata appears to have been accepted without dispute.

The objection has been raised in this appeal that in the circumstances above stated, the three offences against the three accused, Sahebodin, Jethalal and Kila Ranchhod were distinct offences which could not be regarded as offences committed in the same transaction within the meaning of section 239 of the Code of Criminal Procedure, and that the trial of the three accused together was thus in contravention of the provisions of section 233 of the Code, and therefore illegal.

Mr. Justice Russell accepted this objection as fatal to the validity of the proceedings.

Mr. Justice Aston, however, held the trial regular on the authority of *Emperor v. Keshav Krishna* (1). That case, however

(1) (1904) 6 Bom. L. R. 361.

was one in which the accusation was that a stolen article criminally disposed of by one of the accused persons, had been at the same time and place dishonestly received by the other accused person, and it was, therefore, held that charges under section 414 and section 411, Indian Penal Code, formed part of the same transaction, and that the two accused could be jointly tried on those two charges.

The *ratio decidendi* in that case clearly was that the offences of which the two accused were convicted were committed at the same time and place. The commission of the second offence took place in the course of the commission of the first offence. The evidence related to the same time, place, persons and intention.

In the present case, however, the three accused were not tried for respectively assisting in disposing of and receiving the same stolen property or of committing offences at the same time and place. The charges under section 414 were withdrawn. And apparently they were properly withdrawn. For according to the rulings of the Madras High Court (1868, 4 M. H. C. R. Appendix xiii) as well as under the ruling of this Court in *Queen-Empress v. Abu Kala* <sup>(1)</sup> and *Empress v. Sakharam* <sup>(2)</sup>: "Section 414, Indian Penal Code, applies only where there has been no actual receipt of the stolen property." The offence punishable under section 414 is that of voluntarily assisting in disposing of stolen property and therefore must necessarily form part of the same transaction as the receipt by the person to whom it is so disposed of. It necessarily involves manifest criminality in both persons at one and the same time when both offences are committed. But in the present instance, the offence charged against the accused Jethalal was a dishonest receipt on a totally different occasion from those on which the offences charged against Sahebodin and Kila Ranchhod are alleged to have been committed. Between Kila Ranchhod and Jethalal no connection of any kind is suggested. The facts relating to all the three offences charged were different and apparently unconnected. The Government Pleader was asked to point out

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(1) (1891) Cr. R. 28 of 1891.  
 Ratanlal's Unrep. Cr. C. 553.

(2) (1889) Cr. R. 8 of 1889,  
 Ratanlal's Unrep. Cr. C. 449.

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in what respect these distinct offences could be regarded as committed in the same transaction, but was unable to suggest any construction of the phrase "the same transaction," which would apply to the present case.

That phrase, as observed in *Queen-Empress v. Fakirapa* <sup>(1)</sup>, is not defined in the Code. In the judgment of Jardine J. in that case, section 309 of Pitt Taylor on Evidence is referred to as showing that concurrence or proximity of time is the criterion. Birdwood J., however, referred to the Illustrations to sections 235 and 239 as showing that for the phrase "the same transaction" to apply, the offences must either (1) form part of one continuous series of acts or (2) must have been committed at the same time or (3) when an interval of time may have elapsed between the several offences, must have the same specific criminal intent common to them all or (4) when more persons than one are concerned, must be connected by the fact that one of such offences was committed in the course of the commission of the other (see illustration (b) to section 239).

In the present instance a considerable interval of time apparently elapsed between the receipt by Sahebodin and the receipt by Jethalal, and there is no allegation as to any continuity of action between the offences of Kila Ranchhod and Jethalal.

Ordinarily successive dealings by different persons with respect even to the same property would be described as distinct transactions. In this case the property dealt with was different in the offences imputed to Kila Ranchhod and Jethalal. And in the transactions alleged against Sahebodin and Jethalal, only a portion of that which the former received was transferred by him to Jethalal.

If a trader obtains goods from one person and sells a portion of them to a third, it would, I think, be a strain of language to describe his successive dealings as one and the same transaction, unless he were acting merely as an agent representing one or other of the parties. But here no agency is alleged. If it had been alleged that Sahebodin was an agent either for the thieves or for the present accused Jethalal, Sahebodin might have been

(1) (1890) 15 Bom. 491.

charged under section 414 with assisting in the disposal of the goods and the case of *Emperor v. Keshav Krishna*<sup>(1)</sup> would have applied. But here no privity is alleged against Jethalal in respect of Sahebodin's receipt of the goods. Sahebodin received the goods on his own account and his offence was complete (so far as the case for the prosecution goes), before the offence or purpose imputed to Jethalal had begun. The only connecting link between those two offences therefore arose from the identity of the property with which the later offence was concerned, with a portion of that which formed the subject of the earlier offence. But in the offences of which Kila Ranchhod and Jethalal were respectively accused, not even this connecting link existed, and Jethalal had no connection whatever with the property received by Kila Ranchhod.

The words of section 239 are to say the least of it ambiguous if intended to include in the same transaction a series of acts one or more of which had been done at a time before the parties to the subsequent acts had anything to do with that transaction.

The illustrations to the section seem to suggest that the persons to be jointly tried must have been associated from the first in the series of acts which form the same transaction. And this appears to be the construction put on the section in the cases of *Queen-Empress v. Fakirapa*<sup>(2)</sup>, *Queen-Empress v. Dawlata Dhondi*<sup>(3)</sup>, *Queen-Empress v. Chandi Singh*<sup>(4)</sup>. In *Bishnu Banwar v. The Empress*<sup>(5)</sup>, indeed, it was definitely held that a thief and the receiver from him could not be jointly tried. And this decision was referred to without any expression of dissent or disapproval by the Calcutta High Court in *Karu Kalal v. Ram Charan Pal*<sup>(6)</sup>. But in that case the Court held that the misjoinder was a mere irregularity which under section 537 was not fatal to the proceedings.

The case of *Bishnu Banwar*<sup>(5)</sup>, however, has been considered by a Bench of this Court in *Emperor v. Balabhai Hargovind*<sup>(7)</sup>. In that case, which was not cited in argument in the present case, the Court expressed its inability to concur in the view taken in

(1) (1904) 6 Bom. L. R. 361.

(2) (1890) 15 Bom. 491.

(3) Cr. R. 30 of 1897; Ratanlal's  
Unrep. Cr. C. 925.

(4) (1887) 14 Cal. 395.

(5) (1896) 1 C. W. N. 85.

(6) (1900) 28 Cal. 10.

(7) (1904) 6 Bom. L. R. 517.

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*Bishnu Banwar v. Empress* <sup>(1)</sup>. And though the case of *Bishnu Banwar* may show that section 239 is at least patient of the construction there put on it, the ruling in *Emperor v. Balabhai* <sup>(2)</sup> must be accepted in this Court as binding on us as a decision that a thief and the receiver from him may be tried together. It is true that in the present case Sahebodin and Jethalal were not respectively thief and receiver from the thief. In view of the forcible reasoning in *Emperor v. Balabhai* <sup>(2)</sup> and the weight due to the learned Judges who decided it, if not the long established practice to which it refers, I am unable to hold that the provisions of section 239 were necessarily inapplicable to the joint trial of Sahebodin and Jethalal. But I do not think that the case of *Balabhai* disposes of the question whether the joint trial of Kila Ranchhod and Jethalal was sustainable. The reasoning in *Emperor v. Balabhai* <sup>(2)</sup> does not appear to touch that question. For that reasoning merely connects the series of acts as forming the same transaction on the ground of the receiver's guilty knowledge or belief as to the offence which he knows or has reason to believe has been committed. But in the present instance no knowledge or belief as to any dishonest receipt by Kila Ranchhod (the third accused) is imputed by the prosecution to Jethalal. It is not suggested that either of them had the least cause for suspecting that the other had committed an offence, much less that there was preconcert or any association or connection of any kind between them. However reasonable it may be to connect the receipt by Jethalal with receipt by Sahebodin as one transaction, on the ground that the knowledge, or reason to believe, imputed to Jethalal, involved a knowledge of, or reason to believe in, Sahebodin's guilt, it is impossible to apply that reasoning to connect Jethalal with Kila Ranchhod from whom Jethalal received nothing and with regard to whom it is not suggested that Jethalal had any knowledge, acquaintance or connection whatsoever. The Government Pleader has not suggested or urged that there is such connection. The only argument adduced on behalf of the Crown is that the accused Jethalal is not shown to have been prejudiced by the joint trial. This may or may not be the case. Mr. Justice Russell points out reasons for believing

(1) (1896) 1 C. W. N. 35.

(2) (1904) 6 Bom. L. R. 517.

that the complexity of the trial by the introduction of disconnected incidents was prejudicial to the defence. The question is however one of principle and if the procedure in this case is to be accepted as correct, innumerable disconnected incidents might be imported into a case which would render it almost impossible for an innocent person to know when evidence adduced had any bearing on the case against himself.

But when once it appears that a joint trial is not warranted by section 239, and that consequently section 233 has been contravened, the question whether the joint trial is a mere irregularity not fatal unless accused be prejudiced, can now no longer be entertained. For that question has been answered in the negative by the highest judicial authority to which the Courts in India are subject. In the case of *Subrahmania Ayyar v. King-Emperor* <sup>(1)</sup> the Privy Council declared that the disregard of the express provision of law in section 233 as to the mode of trial, was not a mere irregularity which could be remedied under section 537, and the cases of *In the matter of Abdur Rahman* <sup>(2)</sup> and *Karu Kalal v. Ram Charan* <sup>(3)</sup> to the contrary are overruled.

The inevitable result appears to be that the proceedings of the Magistrate were illegal and a nullity. It follows that there has been no trial within the meaning of the Code, and that the proceedings of the Sessions Judge in appeal ending in the acquittal of the accused, are also a nullity, as based on evidence not recorded in a legal trial. It is open to this Court under clause (a) to section 423 in an appeal from an order of acquittal to reverse such order and to order that the accused be retried. But in the present case no such order is necessary or as it seems to me even possible. There has been no legal trial. There has therefore been no legal acquittal and there is therefore neither appeal against acquittal nor acquittal to reverse, and the question whether the accused should now be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with a prosecution. I do not think it desirable therefore to offer any comments on the merits of a case which I concur with Mr. Justice Russell in holding has not been legally tried.

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(1) (1901) 25 Mad. 61; 3 Bom. L. R. 540. (2) (1900) 27 Cal. 889,

(3) (1900) 28 Cal. 10,