ORIGINAL CRIMINAL.

Before Chief Justice Scott and Mr. Justice Batchelor.

IN RE BAL GANGADHAR TILAK. 1908.

September 8.

Criminal Procedure Code (Act V of 1898), sections 233, 234, 235, 236, 237 and 239—Charges, joinder of charges—Privy Council, leave to appeal to, in criminal case—Practice and Procedure.

The accused was charged with an offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860) in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them.

Held, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of.

Sections 235 (2) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

Ex parte Carew(1) and *Dinizulu* v. *Attorney-General of Zululand*(2), followed.

THE accused was the editor, printer and publisher of a weekly newspaper called the "Kesari", which was published at Poona.

(1) [1897] A. C. 719. (2) (1889) 61 L. T. 740.

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The newspaper, in its issue dated the 12th May 1908, contained an article entitled "The Country's Misfortune", and there appeared another article under the heading of "These remedies are not lasting" in its issue dated the 9th June 1908.

The accused was charged before the Chief Presidency Magistrate of Bombay, by complaints filed separately in respect of each article. Each complaint alleged that the accused committed offences punishable under sections 124A and 153A of the Indian Penal Code, 1860, in respect of each of the two articles. Two inquiries were made; and the Magistrate committed the case to the High Court under two committing orders, each of which was based on charges under sections 124A and 153A in reference to each of the two articles.

When the trial in the High Court began, the Advocate-General applied for one trial on all the charges.

Branson (officiating Advocate-General) for the Crown:—Section 234 of the Criminal Procedure Code, 1898, applies to this case. The offences charged are exactly the same: they are committed within three weeks of each other; and, therefore, they should be tried together at one trial. As a matter of fact, there are separate charges with respect to each of the offences. The prosecution desires one trial for all the charges. We are within the wording of section 235 of the Code: see *Emperor* v. *Fattu*[1].

The incriminating articles, as well as the articles which are put in to show the intention of the accused, begin from the 12th May 1908. The newspaper in question has published a series of articles which form the subject-matter of the charges, namely, the articles of the 12th May and the 9th June, and a series of intervening articles upon which we rely as showing that they were all written as part and parcel of one transaction intended for the purpose of producing disaffection and disloyalty against the Government established by law in British India.

The accused in person:—I contend that section 227 of the Criminal Procedure Code, 1898, is the section that applies to this case. The Magistrate has framed the charges under sections 233,

(1) (1903) 26 All. 195.

234 and 235. Section 234 applies to the charge when the charge is first framed by the Magistrate and there is no provision in the Criminal Procedure Code by which the different charges can be amalgamated as it is proposed at present. Secondly, though the articles are in the course of the same transaction, yet they form different subjects altogether; and it would be more convenient for me to have each of them tried separately. The two articles refer to different subjects, and if the trial is jointly carried on, it will introduce a sort of confusion in my mind. Sections 234 and 235 are permissive, but section 233 is imperative. There are separate articles dealing with separate aspects of the question. They do not form part of one transaction.

Branson in reply:—This is not a question of the amendment of charges at all. Even if it be so treated, the Court has great powers under section 226. As a matter of fact the two charges remain unaltered and I propose to try them both together.

I am entitled to put the charges before the Court, and in reference to the possible difficulty of there being four charges I submit that section 235 would dissipate that difficulty altogether. The charges under sections 124A and 153A will be treated as being alternative charges or charges framed in order to meet possibly of one or the other set of facts, in which case either offence might or might not be proved. In that case there would be four charges. In order to avoid the possibility of there being any difficulty or doubt, I propose to proceed under section 333 and say that for the present at all events I will not proceed under section 153A on the first article and that will result in a stay of proceedings and discharge of the accused but not an acquittal.

DAVAR, J.:—In this case two separate informations were laid before the Magistrate, and the Magistrate held two separate enquiries and made two separate commitments. The question now before me is whether these two cases can be taken together and tried at one trial. It would be extremely desirable from my point of view and also, I think, in the interest of the accused himself that there should be one trial if possible and the whole

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question should be before one Jury who tries him. The accused, under section 233 of the Criminal Procedure Code, is entitled to be tried separately unless the provisions of sections 234, 235, 236 and 239 come into operation. I have grave doubts about section 235 applying to this application. It seems to me that there would be some difficulty in holding that separate newspaper articles written week after week would come under the "same transaction"; but I have no difficulty whatever in ordering the same trial under section 234, provided that the charges do not exceed three. In this instance the charges are four, but the Advocate-General offers to make use of section 333 to stay proceedings with reference to one of the four charges. I am quite willing to allow him to make use of that section and to allow him to withdraw any one of the four charges he chooses to withdraw. But I do not wish the Advocate-General to be taken by surprise. I think it would be fair to the accused if the Crown is not prepared to go on with any particular charge or for convenience wishes, or feels inclined, not to proceed with one of the charges that I should under the powers given to me under the same section order that the discharge of the accused should amount to an acquittal. It is not right that the accused should have that charge hanging over him indefinitely. I will order three charges in the two cases to be tried at one trial provided that there are three charges only and the fourth one is abandoned and not kept hanging on the accused's head. That would be for the Advocate-General to decide.

The prosecution accordingly selected three charges, *viz.*, those under section 124A and section 153A with respect to the article dated the 12th May 1908 and the one under section 124A as to the article published on the 9th June 1908.

The trial proceeded with a Jury, on the three charges. The Jury returned their verdict of guilty on all the three charges. The sentence passed was three years' transportation on the first charge under section 124A of the Indian Penal Code, three years' transportation on the second charge under section 124A, the two sentences to run consecutively: and a fine of Rs. 1,000 on the charge under section 153A.

After the sentence was passed the Advocate-General intimated to the Court that he would not proceed on the charge under section 153A, which was held over, and the learned Judge thereupon discharged the accused on that charge directing that the discharge should amount to an acquittal.

The accused, thereupon, applied for leave to appeal to the Privy Council. Among the grounds on which the leave was sought, were the following :—

32 (*h*) That the learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences, not of the same kind and not committed in the same transaction, contrary to the express provisions of section 233 of the Criminal Procedure Code and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal, null and void *ab initio*.

32 (*s*) That the learned Judge acted illegally in passing two sentences, one under section 124A, Indian Penal Code, and the other under section 153A, Indian Penal Code, if it be held by the Court that the transaction is one and the same, but your petitioner submits that the transaction is not the same as ruled by the learned Judge.

32 (*t*) That the learned Judge acted illegally in passing two sentences, one under section 124A and the other under section 153A upon one article and the one and the same act.

The Court in granting a Rule passed the following order :—

As we stated yesterday we issue a Rule calling upon the Crown to show cause why the Court should not grant a certificate that this is a fit case for an appeal to the Privy Council on points 32 (*h*) and 32 (*s*) and (*t*) in the petition of the accused.

We have taken time to consider whether we should issue a Rule upon any other point and we have come to the conclusion that there is no substance in any of the other points that have been taken.

We think it right, however, to mention with regard to point 32 (*r*) as to the addition of a fresh charge at the close of the case with reference to the previous conviction that it appears to us upon the *ex parte* argument which we have heard that a procedure was adopted which is not contemplated by the Criminal Procedure Code. It was evidently adopted in order to bring to the mind of the Judge in passing sentence the fact that the

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prisoner had been previously convicted. But that fact was obviously already present to his mind, for he had cited copiously from the summing up of Mr. Justice Strachey in the previous Tilak Trial in 1897, and he had before him and present to his mind the affidavits that had been made on the bail application which mentioned the previous conviction and the undertaking which had been given by the prisoner upon his release. We, therefore, think there is no substance whatever in the objection that has been taken, and it would not be right to needlessly occupy the time of the Court by granting a Rule upon the point thus inviting further argument.

We make the Rule returnable on Wednesday next.

Baptista, in support of the rule:—

Section 233, Criminal Procedure Code, lays down the fundamental rule, any contravention of which constitutes an illegality incurable by section 537 upon the Privy Council decision in *Subrahmania Ayyar* v. *King-Emperor*(1). This case was followed in several cases in Bombay: see *King-Emperor* v. *Krishnarao*(2); *Emperor* v. *Nathalal*(3); *Emperor* v. *Lallubhai*(4); *Emperor* v. *Wassanji Dayal*(5); and *Emperor* v. *Jethalal*(6). The number of offences may be large or small. That makes no difference. If the rule is infringed the trial is illegal. In *Emperor* v. *Wassanji Dayal*(5) only two offences under sections 380 and 414, Indian Penal Code, were charged. In *Nawab Khajah Solemollah Bahadur* v. *Ishan Chandra Das*(7) the Court even held the trial was illegal for omitting to give the notice prescribed in section 145, clause (3), of the Criminal Procedure Code.

Section 234 does not apply, because the offences are not of the same kind as they do not come within the same section, and the amount of punishment is not the same.

Section 235 does not apply, for this section with all its clauses is confined to offences committed in the same transaction only: see *Sher Shah* v. *Empress*(8); *Gopaluni Narasaiya*(9). If it were

(1) (1901) 25 Mad. 61.
(2) (1902) 4 Bom. L. R. 53.
(3) (1902) 4 Bom. L. R. 433.
(4) (1902) 4 Bom. L. R. 440.
(5) (1904) 6 Bom. L. R. 725.
(6) (1905) 29 Bom. 449; 7 Bom. L. R. 527.
(7) (1905) 9 C. W. N. 909.
(8) (1887) P. R. No. 43 of 1887 (Cri.)
(9) (1883) Weir 892.

not confined to the same transaction, these trials can never be illegal and the Privy Council ruling in *Subrahmania's case* would be wrong. In this case the two articles do not form part of the same transaction.

Section 236 is also confined to the same transaction. Moreover, it does not apply to the present case because this is no case of doubt.

It is, therefore, clear that the excepted cases in section 233, taken singly, do not sanction the trial in the mode in which it was conducted; but it is contended that if the exceptions are taken cumulatively the trial is legal. This depends upon the construction of section 233. The question remains whether they can be taken cumulatively. I submit they cannot be so taken.

The policy of section 233 is plainly designed for the protection of the accused. It is a humane rule for the purpose of preventing confusion, embarrassment, or prejudice to the accused by the very multiplicity of charges. The true construction would therefore be the one that would "suppress the mischief and advance the remedy." See Maxwell on the Interpretation of Statutes (3rd edition), Ch. X, pp. 367 *et seq.* and p. 385.

The natural meaning of the words in section 233 appears to be that the exceptions in section 233 should be taken *singly* and not *cumulatively*. No doubt the exceptions are joined by the word "and". But the words are "except in the *cases* mentioned in sections 234, 235, 236 and 239." This phraseology makes all the difference. We have to look to the *cases* mentioned in the sections and see whether the present trial is covered by any of those *cases* and not by a new case formed by a combination of two or more of those cases. It is, however, clear that section 234 cannot be taken cumulatively with section 239: see *Budhai Sheikh* v. *Tarap Sheikh*[1]. "And" must therefore be read as "or" as far as section 239 is concerned. That being so "and" must be read as "or" with respect to all the sections. It cannot be read "and" and "or" in the same section. Moreover, if the exceptions were not mutually exclusive, why not combine all the sections 234, 235, 236 and 239? This would render the rule

(1) (1905) 10 C. W. N. 32.

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in section 233 perfectly nugatory. It would then be difficult to conceive of any case of misjoinder. If that was intended the Legislature would have used plainer language instead of all this circumlocution and would not make these elaborate provisions for possible contingencies. Besides the limited interpretation would prevent the law being circumvented by the addition of fictitious charges. For example, it is admitted that the offence under section 124A in one transaction cannot be joined with the offence under section 153A in another transaction and tried together. Yet the addition of a fictitious charge under section 124A in the second transaction would enable the Crown to do so if the aid of section 235 or section 236 can be invoked: see *Abdul Majid* v. *Emperor*[1].

Furthermore, section 234 cannot be joined with section 235 as they are mutually destructive. Section 234 looks exclusively to number, time, and sameness of the offences without regard to the number of transactions. Section 235 is the converse of section 234. It looks exclusively to the sameness of the transactions and is indifferent as to the number, time and sameness of the offences. The essential ingredients of section 234 are immaterial in section 235 and *vice versâ*. A combination of the two must end in the destruction of the essentials of each.

It is contended that the word 'section' in section 234 may be read as 'sections', and if that be done, then the offences under sections 124A and 153A in one transaction can be joined with offence under sections 124A and 153A in respect of another transaction because then they are offences of the same kind as they fall respectively under the same sections. But if this be so, it would make no difference whether there are two or twenty offences in each transaction. This would render the protection designed by section 233 practically worthless. There is really no reason to read 'section' as 'sections.' The word "transaction" in section 239 cannot be read in the plural: see *Budhai Sheikh* v. *Tarap Sheikh*[2]. What section 239 is to "transaction", section 234 is to "section." The General Clauses Act does not apply because to read 'section' in the plural is repugnant to the

(1) (1906) 33 Cal. 1256 at pp. 1267-68.

(2) (1905) 10 C. W. N. 32.

context. If the present sections be compared with the sections on the same subject in Act X of 1872, it will be perceived that the Legislature disapproves of such extension in meaning. Section 453 of the old Code (Act X of 1872) is now section 234. In the old section 453 there was an explanation. It referred to the old section 455, which corresponded with the present section 236. The old explanation incorporated what is now section 236, in the very definition of 'offences of the same kind.' Thereby it extended the meaning of the expression 'offences of the same kind': see *Manu Miya* v. *The Empress*(1). But that explanation has no place in the present Code. Its exclusion from the new Code excludes section 236 (old section 455). The legislature has thereby indicated that now section 234 is not to include cognate offences or doubtful sections falling within section 236. *A fortiori* it must exclude other more distinct offences.

In this connection the addition of clause (2) to section 222 makes it clear that the word offence as used in section 234 was not intended to include every act so connected with that offence as to form part of the same transaction: see *Bhagwati Dial* v. *King-Emperor*(2) and *Subrahmania Ayyar* v. *King-Emperor*(3). The whole question whether section can be read as sections and whether the exceptions can be taken cumulatively has been very carefully considered in *Bhagwati Dial* v. *King-Emperor*(2); *Kasi Viswanathan* v. *Emperor*(4); *Nga Lun Maung* v. *King-Emperor*(5); and *Budhai Sheikh* v. *Tarap Sheikh*(6). All these cases hold that the sections are mutually exclusive, and section cannot be read as sections: see also *Bipin Chandra Pal* v. *Emperor*(7); and *Queen* v. *Itwaree*(8); *Queen-Empress* v. *Mulua*(9). The only exception is *Emperor* v. *Tribhovandas*(10) decided the other day by a Division Bench of this Court. But that decision is distinguishable from the present case. In that case there were not distinct charges on sections 124A and 153A but one charge for both.

(1) (1882) 9 Cal. 371.
(2) (1905) P. R. No. 2 of 1905 (Cri.).
(3) (1901) 25 Mad. 61 at p. 73.
(4) (1907) 30 Mad. 328.
(5) (1902) 2 Lower Burma Rulnigs, p. 10.
(6) (1905) 10 C. W. N. 32.
(7) (1907) 35 Cal. 161.
(8) (1866) 6 W. R. 83 (Cri. Rul.).
(9) (1892) 14 All. 502.
(10) *ante* p. 77: 10 Bom. L. R. 801.

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They were regarded by the Appellate Court as alternate charges. The Appellate Court confirmed the conviction on one offence only, *viz.*, section 124A. The sentences were not separate on sections 124A and 153A. There was only one sentence and that within the maximum imposeable under section 153A.

The grounds on which His Majesty will review criminal proceedings are specified in *Queen-Empress* v. *Bal Gangadhar Tilak*[1] and *In re Dillet*.[2] In this case there is an important question of law. Unless corrected the misjoinder will create a precedent that would divert the law into new channels and prove prejudicial to accused in other cases, and open the door to grave mischief and miscarriage of justice. The mode of trial adopted disregarded the forms of legal process. It is desirable to obtain the decision of the highest tribunal in the Empire upon this point. Secondly, if the trial is illegal, there can be no conviction and sentence. The detention of the petitioner in jail is a violation of the principles of natural justice and constitutes substantial and grave injustice. There is now no means of remedying the injustice except by an appeal to the Privy Council. This Court has not to see whether substantial or grave injustice is done, but leave that to the Privy Council. This Court has to make the requisite declaration if a *primâ facie* case is made out. Thirdly, this case goes to the very root of jurisdiction. The Court has no jurisdiction to try a man on such a misjoinder of offences and charges. This is, therefore, a case where the Court should declare that it is a fit case for appeal to His Majesty in Council.

Robertson, Advocate-General, instructed by the Government Solicitor, to shew cause:—No attempt is made to bring this case within the rule laid down by the Judicial Committee of the Privy Council in *Ex parte Carew*[3]. Every irregularity in procedure, as laid down in the Criminal Procedure Code, does not permit a party to go to the Privy Council: but the party seeking for leave must shew that departure from the required procedure has caused substantial and grave injustice to be done. It is not

(1) (1897) 22 Bom. 112 at p. 150. (2) (1887) 12 App. Cas. 459.
(3) [1897] A. C. 719.

sufficient to show that there was an irregularity, and to argue from that that because there was an irregularity there was also an illegality. Some little injustice inevitably results from every irregularity; but section 537, Criminal Procedure Code, is designed to cover such cases. In criminal cases leave is not given to appeal to the Privy Council upon the ground of a violation of a technical rule of procedure: see *Dinizulu* v. *Attorney-General of Zululand*(1). No prejudice was caused to the accused in his trial by the joinder of charges, nor was there any violation of an express provision of the law. As to when special leave to appeal is granted, see Safford and Wheeler's Privy Council Practice, pp. 755, 756, 757; *Attorney-General of New South Wales* v. *Bertrand*(2).

'Offence' is defined in section 4 (*o*), Criminal Procedure Code, as any act or omission made punishable by any law for the time being in force. The offence is the act or omission and it is with the act or omission that a man is charged. Here the acts are the publications on two different dates. There are, therefore, only two offences though the acts constituting such offences are punishable under different sections of the Code. The word 'act' may be compared with the word 'game'. Game is a general or a particular term. The game of golf, or cricket, &c., or one, two or more games of golf, &c. In the same way the word offence may be used in a general or a particular sense. The act constituting the offence may be punishable under several sections defining particular offences. The word 'offence' is used in a general sense in some sections of the Code and in a limited sense in others. In section 233 it is used strictly according to the definition meaning. The section does not say that for every act punishable under several sections the accused should be tried separately. What section 234 looks to is the 'act,' *i. e.*, the general offence and not the particular one. This case is governed by the ruling in *Emperor* v. *Tribhovandas*(3).

The two articles formed part of the same transaction. If both articles could be charged under section 124A and tried at one trial under section 234, Criminal Procedure Code, the mere addi-

(1) (1889) 61 L. T. 740. (2) (1867) L. R. 1 P. C. 520 at p. 530.

(3) *ante* p. 77: 10 Bom. L. R. 801.

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tion of a charge under section 153A in respect of the second article has not caused grave and substantial injustice. No suggestion is made that the accused was embarrassed in his defence. The accused himself said in his statement that the two articles formed part of one controversy.

Section 235, cl. (1), Criminal Procedure Code, applies to this case, because a series of articles were published by the accused forming part of the same transaction, namely, that of defaming the Government. Section 235 cl. (2) also applies. 'Offence' in this clause is used in a distributive sense. One act may give rise to several offences.

Section 233, Criminal Procedure Code, mentions as exceptions "sections 234, 235, 236 and 239." The word 'and' indicates that the Legislature did not mean these sections to be mutually exclusive.

Section 236 also applies, if the charge under section 153A is considered to be an alternative charge; and there is nothing in the mode in which the charges are framed in this case which militates against this view. In a trial under s. 236 it is not necessary that conviction should only be as regards one offence: the accused may be convicted on each of the offences charged.

As regards sentences, if the trial is legal, then the sentences are legal. Unless the trial is set aside the Privy Council will not interfere with the sentences.

Baptista in reply:—"Act" and "offence" are not synonymous terms. Acts are not charged but offences are charged, and acts are only mentioned to give notice of the way in which the offence is committed. One act may give rise to many distinct offences. If a man fires a gun in a crowd where Police officers are doing duty he may hurt one, cause grievous hurt to another, murder a third, set fire to a house, and injure or kill Police officers. One single act of firing the gun would thus result in many offences. Offences are committed not by acts alone, but acts and their consequences, though juridically all these are acts. Similarly, if a man publishes an article whereby he defames A, B and C, he commits three distinct offences of defamation. So one publication may give rise to two offences under section 124A and

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section 153A of the Indian Penal Code, but they are nevertheless distinct offences and those offences are charged and not the act of publication. The act of publication is really one of the series of acts which constitute one transaction. The series of acts consist in writing each word of the article, delivering the written article to compositors, etc., and finally the publication in the newspaper.

The two articles do not form part of the same transaction. The accused said so in so many terms. The version of the official short-hand writer is not correct. The correct version is that given by the short-hand writer engaged by the accused and that, I understand, tallies with that of the short-hand writer engaged by the prosecution. Apart from this the accused cannot be pinned down to every word he utters in a charge to the jury or in urging his objections. It is quite clear from the points asked to be reserved that he regarded the transactions as distinct or else he could have no objection to the joinder of charges. Parties cannot make transactions the *same* if they are *distinct* in the eye of the law. As to what constitutes the same transaction, see Stephen's definition quoted in Cunningham on Evidence (7th edn.), p. 92. The point was fully considered in *Queen-Empress* v. *Fakirappa*[1]; *Queen-Empress* v. *Vajiram*[2]; *Emperor* v. *Punya Naika*[3]; and *Emperor* v. *Sherufalli*[4]. The publications of the 12th May and 9th June cannot form the same transaction. The authors are distinct persons. This we would have proved but Mr. Justice Davar ruled that the transactions were not the same. The accused of course accepted the full legal responsibility but not the authorship. Secondly, the subjects are not the same. There is no continuity. There is an interval of nearly one month. The Crown regarded this as distinct transactions. The sanctions under section 196, Criminal Procedure Code, were distinct, one for each article. In the Criminal Sessions of the High Court the Crown applied for a Special Jury for each case and two Special Juries were ordered by the Judge. The Judge did not regard the transactions as the same. The Jury too went on that

(1) (1890) 15 Bom. 491.
(2) (1892) 16 Bom. 414 at p. 424.
(3) (1902) 4 Bom. L. R. 789.
(4) (1902) 27 Bom. 135: 4 Bom. L. R. 910.

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basis and brought in distinct verdicts. In the face of two sanctions, two complaints, two warrants, two inquiries, two committals, two applications for Special Juries by the Crown, two convictions and two sentences on section 124 A alone, a third conviction on section 153 A and an acquittal on the second section 153 A, it is impossible now for the Crown to contend with any fairness that the two articles constitute the same transaction.

SCOTT, C. J.—This is a rule granted by us on a petition for a certificate that the decision of the judge and jury in the case of *Emperor* v. *B. G. Tilak*[1] is a fit subject for appeal to His Majesty in Council.

Before granting the rule we required counsel for the petitioner to specify the grounds upon which he was prepared to support his application. He then argued that a certificate should be granted as prayed for each of the reasons specified in paragraphs 32 to 35 of the petition. After hearing his arguments we decided that it was unnecessary to call on the Crown to show cause upon any points, except points (*h*) (*s*) and (*t*) of paragraph 32 of the petition and we accordingly granted a rule upon those points only.

The rule has now been argued. We can only grant the required certificate if in our opinion the case is a fit one for appeal. The test of fitness is furnished by various decisions of the Judicial Committee which show the circumstances under which they will entertain appeals in criminal cases. It is sufficient to refer to *Ex parte Carew*[2] and *Dinizulu* v. *Attorney-General of Zululand*[3], in both of which the judgment was delivered by Lord Halsbury. In the former case the rule was stated thus: "It is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a criminal investigation is not granted by this Board. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of the argument: *In re Dillet*[4], 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or

(1) (1908) 10 Bom. L. R. 848.
(2) [1897] A. C. 719.
(3) (1889) 61 L. T. 740.
(4) (1887) 12 App. Cas. 459.

by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.' In the latter case the Lord Chancellor said: "It appears to them that nothing could be more destructive to the administration of criminal justice than a sort of notion that any criminal case which was tried in any colony from which an appeal lay to this Committee can be brought here on appeal, not upon the broad grounds of some departure from the principles of natural justice, but because some form or technicality has not been sufficiently observed. That is a principle, which they believe, never has been permitted, and never, they trust, will be permitted." Therefore, before granting the certificate asked for, we must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

We are not sitting as a Court of error. It is not for us to decide whether such injustice has in fact been done. We have merely to be satisfied that a reasonable case has been made out. The petitioner was tried before Mr. Justice Davar and a special jury on a charge framed under section 124A, Indian Penal Code, in respect of an article published in the *Kesari*, of which he was editor and proprietor, on the 12th of May 1908, and on another charge under section 124A and one under section 153A in respect of an article in the *Kesari* of the 9th June 1908. He was found guilty and sentenced on each of the first and second charges to three years' transportation, and on the third charge to a fine of Rs. 1,000.

It is now argued that the trial was illegal as being in contravention of the provisions of section 233, Criminal Procedure Code, which lays down that for every distinct offence there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.

The accused was originally charged separately before the Chief Presidency Magistrate on the 29th June, under sections 124A and 153A in respect of the article of the 12th May, and under the same sections in respect of the article of the 9th June.

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He was committed to the High Court Sessions for trial on both sets of charges.

In the Sessions Court (as appears from the note of the official short-hand writer corrected by the learned Judge) the Advocate-General appearing for the prosecution asked that the accused should be tried on the four charges at one trial, contending that the articles forming the subject of the charge, and certain other articles intermediate in point of time, formed one transaction, in which the offences charged had all been committed, and that therefore, the joinder was permissible under section 235 (1), Criminal Procedure Code. The learned Judge objected, that if the charges were consolidated, there would be four charges. The Advocate-General then said he would not put the accused upon the charge under section 153A, in respect of the first article.

The accused, who conducted his own case, with the assistance of several well-known lawyers, objected first, that there was no provision of the Code by which different charges could be amalgamated as proposed, and, secondly, that though the articles were in the course of the same transaction, yet they formed different subjects altogether, and it would be more convenient to have them tried separately, and confusing if they were taken together, that sections 234 and 235 were permissive, while section 233 was imperative, that the articles were separate articles dealing with separate aspects of the question, and did not form part of one transaction. Eventually, the learned Judge said he thought it would be extremely desirable, and in the interest of the accused himself, that there should be one trial, and that the whole question should be before one jury; the accused under section 233 was entitled to be tried separately, unless the provisions of sections 234, 235, 236 and 239 came into operation. He had grave doubts as to the applicability of section 235 as there would be some difficulty in holding that separate newspaper articles written week after week would come under the same transaction, but he had no difficulty in ordering the trial under section 234 provided the charges did not exceed three. The trial then commenced on three charges, one under section 124A on the article of the 12th May, and one

under section 124A, and another under section 153A, on the article of the 9th June, with the result above stated.

After the verdict and before sentence the accused applied that certain points should be reserved and referred, under section 434, Criminal Procedure Code, for the decision of a Full Bench. The points mentioned are included in the points raised in the present petition. The Judge, however, declined to reserve any points.

Dealing now with the legal argument addressed to us that the trial was altogether unlawful, as having been in contravention of the terms of section 233 it is apparent that the argument involves two assumptions: (1) that the offences charged were not "committed by the same person in a series of acts so connected together as to form the same transaction," and therefore did not fall within the scope of section 235 (1); and (2) that the exceptions mentioned in section 233 are mutually exclusive. The justification for the first assumption is by no means apparent. Besides the preliminary discussion upon the point to which we have already referred, we note that at the trial in addition to the articles of the 12th May and 9th June other articles and notes published by the accused in the *Kesari*, from the 12th May to the 9th June inclusive, were put in (Exhibits E to I). The Judge in his charge to the Jury pointed out that the subject of all the articles, including those the subject of the charge, was the advent of the bomb. The accused himself when opening his defence read to the Court a written statement in which he stated that the charged articles were part of a controversy in which he had endeavoured to maintain and defend his views in regard to the political reforms required in India at the present day. In this connection we may also refer to paragraph 36 of the petition now before us. We think, therefore, that there are good reasons for the contention placed before us by the Advocate-General that the charges all fall within the scope of section 235 (1).

Assuming, however, that the Advocate-General's contention just referred to is unsustainable, the petitioner has still to make good the second assumption, namely, that the exceptions mentioned in section 233 are mutually exclusive. The words of the section do not favour this view. If it had been intended

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that section 235 (2) or section 236 could not be made use of in co-operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of sections 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

For example, if A were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building the accused could not be convicted of simple theft under the powers conferred by section 237 because the applicability of section 236 would be negatived by the mere fact of the joint trial under section 234.

We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive; and that sections 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

It is of course possible for ingenuity to suggest cases in which the full exercise by the Court of the permissive powers conferred by the sections which we have been discussing may produce embarrassment. In such cases the discretionary power of the Court still remains to decline to avail itself of its full powers.

The view which commends itself to us was also taken by another Bench of this Court in the recent case of *Emperor* v. *Tribhovandas*.[1] In our opinion the learned Judge (though he appears to have overlooked section 234 (2)) might have allowed the trial to proceed on all four charges without violating the provisions of the law.

If we now for the purpose of argument assume that the petitioner has established the second assumption also, we have

(1) *ante* p. 77: 10 Bom. L. R. 801.

still to be satisfied that reasonable grounds exist for thinking that grave and substantial injustice may have been done at the trial before we can grant the certificate. As we understood the argument on the rule it is not contended that injustice has been done except in so far as the alleged disregard of the provisions of Criminal Procedure Code in itself constitutes an injustice but we were urged to grant a certificate as the case would be important as a precedent.

We do not think the accused was in any way prejudiced by what took place at the trial. An accused person may it is clear be legally tried and convicted in one trial, under section 124 A or section 153 A, on charges framed on three disconnected articles. How then can it be said that grave and substantial injustice has been done by the arraignment and conviction of the accused on three cognate charges in respect of only two (and those not disconnected) articles?

As regards the question raised by paragraph 32 (*s*) and (*t*) of the petition with respect to the number of separate sentences imposed, the jury found the accused guilty of three distinct offences and the Judge awarded a punishment for them which in the aggregate is much below the maximum punishment allowed for one of the offences under section 124 A. There has, therefore, been no violation of the provisions of section 71 of the Indian Penal Code.

For the above reasons we discharge the rule.

Before leaving the case, however, we think it right to point out that the Advocate-General, according to the note of the official short-hand writer, stated that the charges under sections 124A and 153A would be treated as being alternative charges or charges framed in order to meet the possibility of one or the other set of facts being proved, in which case each offence might or might not be proved. This may mean either that the second and third charges fell under section 235 (2), or that they fell under section 236. The charges as framed were not expressed to be in the alternative, and the verdict of guilty was given in respect of each charge separately. There was, we think, nothing illegal in this; but if it was the intention of the Crown that the

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second and third charges should only operate alternatively the result intended can now be arrived at by the exercise by the Government of its powers under Chapter XXIX of the Criminal Procedure Code in respect of the sentence imposed under section 153A upon the third charge.

Rule discharged.

R. R.

ORIGINAL CRIMINAL.

Before Chief Justice Scott and Mr. Justice Batchelor.

1908. September 29.

IN RE NARASINHA CHINTAMAN KELKAR.

Contempt of Court—Criticism of Judge—Language used in criticism which strikes at the root of all respect for the Court.

Any act done or writing published, calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or to obstruct or interfere with due course of justice or the lawful process of the Court is a contempt of Court.

Judges and Court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court.

Reg. v. *Gray* (1), followed.

THIS was a rule calling upon Narsinha Chintaman Kelkar, editor of the "Mahratha," to show cause why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of defamatory passages concerning the Honourable Mr. Justice Davar, contained in an article published by him in the issue of his newspaper dated the 26th July 1908.

The rule nisi was in the following terms :—

Upon reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908 and after hearing the Advocate-General, Bombay, who applies that a rule nisi be issued against Narsinha Chintaman Kelkar, Editor and Publisher of the 'Mahratha' newspaper, requiring him to shew cause, if any he has, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an

(1) [1900] 2 Q. B. 36 at p. 39.