

(1923) 02 CAL CK 0034

Calcutta High Court

Case No: None

Tulsi Tolini

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** Feb. 6, 1923**Citation:** AIR 1923 Cal 596 : 72 Ind. Cas. 372**Hon'ble Judges:** Suhrawardy, J; Newbould, J**Bench:** Division Bench

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### Judgement

1. The petitioner, Tulsi Tolim, has been convicted of an offence punishable u/s 54A of Act IV of 1866 Calcutta Police Act. That section runs as follows : "Whoever has in his possession, or conveys in any manner, or offers for sale or pawn, anything which there is reason to believe to have been stolen or fraudulently obtained, shall, if he fails to account for such possession or act to the satisfaction of the Magistrate be liable to fine, etc." At the trial the only charge framed against her was that she committed theft in respect of gold and silver ornaments, cloths and cash Rs. 13,410 in G.C. notes, sovereigns and coins valued in all about Rs. 18,000 from the room of one Khelwan Ahir and thereby committed an offence punishable u/s 380, Indian Penal Code. This rule has been granted on two grounds. The first relates to the legality of the conviction u/s 54A of the Calcutta Police Act, on the charge framed, the other, to the legality of the conviction under this section on the facts found.

2. As regards the first ground, it is contended on behalf of the Crown that Sections 237 and 238, Criminal Procedure Code, render the conviction legal. We are of opinion the provisions of Section 237, Criminal Procedure Code, alone are sufficient and it is, therefore, unnecessary to consider whether the offence punishable u/s 54A of the Calcutta Police Act is a minor offence to that of retaining stolen property, punishable u/s 411, Indian Penal Code. Nor need we consider whether the double operation of Sections 237 and 238 can, be invoked to support the contention that, since Section 237 would render an accused liable to conviction u/s 411 on a charge of theft, he could also on such a charge be convicted of an offence that is minor to

one punishable u/s 411, Indian Penal Code.

3. Clause (1), Section 237, Criminal Procedure Code, runs as follows:--"If in the case, mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it." The Illustration to this section is, "A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods." He may be convicted of criminal breach of trust, or of receiving stolen goods (as the case may be) though he was not charged with such offence." It thus appears that the legality of a conviction for an offence not charged depends, when reliance is placed on Section 237, on whether the different offence of which the accused has been convicted is one for which he might have been charged under the provisions of Section 236, Criminal Procedure Code, which is in the following terms. "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences." In the present case the prosecution based their case on a series of acts of a suspicious nature and asked the Court to draw an inference from those acts that the accused had herself committed theft of the articles mentioned in the charge from the room of Khelwan Ahir. But if from the facts proved in support of this charge of theft it was doubtful whether the Court could draw this inference and the Court might draw the inference that an offence punishable u/s 54A of the Calcutta Police Act had been committed, the accused might have been charged at the trial with both, those offences u/s 236 and this conviction would be in accordance with the provisions of Section 237, Criminal Procedure Code.

4. In addition to the evidence of the theft, evidence of suspicious acts is set out at length in the judgment of the Trying Magistrate and classified under four heads; stated shortly, the first is evidence of the complainant's daughter-in-law that the accused obtained possession of the key and padlock of the door which separated her rooms from the room of the complainant in which the theft was committed. The second is evidence of large payments by the accused to the creditors about the time of the theft. The third is evidence of the accused pledging ornaments and attempting to change notes for Rs. 1,000. The fourth is evidence that the accused gave a goldsmith old ornaments to be melted down under suspicious circumstances. The evidence as to the first and third series of these suspicious acts has been disbelieved and that as to the second and fourth believed by the Magistrate. This being the case for the prosecution, we hold that Section 236 was clearly applicable. In the words of that Section, the series of acts was of such a nature that it was doubtful which of several offences the facts which could be proved would constitute. If all the acts alleged had been proved facts, the Court

might have convicted the accused of theft or might even in that case have refused to draw the inference that the accused was the actual thief. That a charge u/s 54A of the Calcutta Police Act might have been joined, with a charge of theft under the provisions of Section 236, Criminal Procedure Code, was held by this Court in the case of *Manhari Chowdhury v. Emperor* 43 Ind. Cas. 614 : 22 C.W.N. 199 : 19 Cri.L.J. 198 : 27 C.L.J. 434 : 45 C. 727. It is true, as contended on behalf of the petitioner, that in that case the point decided was the applicability of Section 403, Criminal Procedure Code, and that the facts are distinguishable in one important particular. But, regarded as an obiter dictum, this judgment read as a whole shows that another Divisional Bench of this Court interpreted Sections 236 and 237, Criminal Procedure Code, in the same way that we do. For the above reasons we hold that the accused could have been tried under the provisions of Section 236 on charges of offences punishable u/s 380, Indian Penal Code, and Section 54A of the Calcutta Police Act and that, therefore, u/s 237 she could be convicted of the offences punishable under the latter Section though she was not charged with it.

5. It is also contended that the power of the Magistrate to apply Section 237, Criminal Procedure Code, is discretionary and that it should not have been applied in the present case since the result has been to prejudice the accused in her defence. We hold that she has not been prejudiced. On the charge framed she was required to account for the possession of the ornaments which she gave to the goldsmith to be melted. Whether these were stolen property and whether she could account for their possession were as important issues on the charge framed as they are on the charge of which she has been convicted. We, therefore, hold that the first ground on which this Rule was granted has not been established.

6. The Rule was granted on the second ground to enable us to examine whether the conviction was in accordance with the principle laid down in *Queen-Empress v. Dhanjibhai Edulji* 20 B. 348 : 10 Ind. Dec. (N.S.) 793; *Sukhu Kalwar v. Emperor* 47 Ind. Cas. 657 : 22 C.W.N. 936 : 28 C.L.J. 262 : Cri.L.J. 933 and *Bat Das v. Ali Bux Khan* 59 Ind. Cas. 554 : 23 C.W.N. 1053 : 22 Cri.L.J. 122 that there must be reason to believe that the property found in the accused's possession was stolen as a preliminary condition before the accused can be called on to account for that possession. In the present case the accused's conduct in making over the 67 1/2 tolas of gold ornaments to be melted is sufficient to give reason to believe that she was in possession of stolen property. This preliminary condition was, therefore, fulfilled in the present case and, with the Magistrate's finding that she has not given a satisfactory explanation of the possession of these ornaments, is sufficient to support the conviction.

7. We, therefore, discharge this Rule. The petitioner must surrender to her bail and undergo the unexpired portion of her sentence.