(1935) 10 BOM CK 0015

Bombay High Court

Case No: None

Shapurji Sorabji and Another		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Oct. 18, 1935

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 235(1)
- Penal Code, 1860 (IPC) - Section 471

Citation: 162 Ind. Cas. 399

Hon'ble Judges: Divatia, J; Broomfield, J

Bench: Division Bench

Judgement

Broomfield, J.

The appellants have been convicted by the Sessions Judge of Aden of offences under Sections 409, 403, 420, 467, and 471 Penal, Code. Both of them were employees of the Aden Settlement Executive Committee, No. 1 Snapurji Sorabji being the Head Accountant and No. 2, Jacob David, the accounts clerk. One of the functions of this body is to supply water to the public on payment. This is done for the most pare by the sale of water tickets issued in books of 16 for Rs. 9 per book. The price was formerly Rs. 12. Accused Nos. 1 and 2 were responsible for the sale of these books and for paying the money received into the bank. No. 1 had the books in his charge and issued them as required. No. 2 usually sold them except on Saturdays when No. 1 himself did so. No. 2 is a Jew and did not attend office on that day. From February 1, to June 1, 1934, No. 2 was on leave and the witness Saleh Saleh A. Khalifa did his work for him. Particulars of the books sold, including the serial number, the name of the purchsser and so on were entered in a register kept for the purpose and each ticket was impressed with the settlement stamp which accused No. 1 had in his charge. Towards the end of February 1935, the official of the Water and Drainage Department which is a department under the Executive Committee, discovered that water was being issued at the water stations in a

quantity very largely in excess of what was accounted for by the sale of tickets entered in the sale register. It was also discovered that tickets not entered in this register were being presented at the water stations. On further investigation of the matter it was found that these unauthorized tickets to the number of 4,100 books had been printed at a Press called the Caxton Press at Steamer Point, whereas the authorized books of tickets were all printed at the material time at the Howard Press, Aden. The case for the prosecution stating it very briefly, is that both the accused caused these spurious books to be printed and misappropriated the proceeds thereby committing offences of breach of trust, cheating, forgery and using forged tickets as genuine. The Sessions Judge agreeing with two of the three assessors has convicted both the accused on all counts and sentenced them to various terms of imprisonment.

2. Learned Counsel who appears for accused No. 1 in this appeal has raised a number of preliminary objections to the legality of the charges and, as, after careful consideration we have come to the conclusion that these objections must be sustained and that the illegalities vitiate the whole trial, I propose to deal with that matter first of all. The charges against accused No. 1 are these:

Firstly, that you between March 1, 1934, and the end of February 1935, being Head Accountant of the Aden Settlement, and as such, a public servant entrusted with dominion over money realized by the sale of Settlement water committed criminal breach of trust in respect of Rs. 23, 511-15-0 or a portion thereof realized from the sale of water tickets which to your knowledge were not genuine.

Secondly, that during the period of May 1933, to February, 1935, you forged or caused to be forged 4,100 water ticket books or a portion thereof which books were of the nature of a valuable security or receipt empowering the delivery of water.

Thirdly, that you between the above-mentioned dates fraudulently caused to be used as genuine water ticket books which you knew or had reason to believe were forgeries.

Fourthly, that you between March 1 and the end of February, 1935, cheated the Aden Settlement by inducing the water authorities to part with water on the strength of water tickets which to your knowledge, were fradulent thereby committing offences punishable under Sections 409, 467, 471 and 420, Penal Code.

3. The charges against accused No. 2 are in precisely the same terms except "that, as he is not a public servant he is charged with breach of trust u/s 408 instead of u/s 409. The first objection which has been taken to these charges is that the offence of breach of trust cannot have been committed because there was no entrust ment to either of the accused either of the books alleged to have been forged or of the proceeds thereof. This objection we consider to be sound but it is not very material. What these accused are alleged to have done in effect was to sell the water belonging to the Aden Settlement Committee and misappropriate the proceeds. The money which they obtained by the sale of these

spurious books was undoubtedly the property of the Committee, and although the charge of breach of trust could not be sustained, the accused might be convicted of misappropriation which might be regarded as a minor offence included in the charge of breach of trust.

4. The serious objection to the charges arises from the joinder of these four charges and in particular from the inclusion in the second and third charges of alleged offences of forgery extending over a period of nearly two years. From the evidence of the Manager of the Caxton Press, Jacob Cohen, and from a statement which he has prepared from his accounts, Ex. 39, it appears that these spurious books were supplied as he says on the order of accused No. 2, in batches sometimes of 200, sometimes of 300 books and on one occasion of 100 books only. They were supplied at intervals from May 3, 1933, to February 7, 1935. The interval between the dates of delivery of the various consignments varied from a few days in some cases to a month or even several months. Charges in respect of the total number of alleged forgeries extending over this period could only be tried on one charge and at one trial, and such charges could only be combined with the other charges of breach of trust or misappropriation and cheating if the whole series of acts covered by the four charges can properly be considered as forming the same transaction. That is to say, trial on these four charges is only legal if it comes within the terms of Section 235,Criminal Procedure Code which as an exception to the general rule that distinct offences must he separately tried provides in Sub-section (1) that if in one series of acts so connected together as to form the same transaction more, offences than one are committed by the some person, he may be charged with and fried at one trial for every such offence. The word "transaction" is rather a vagaue term it is not detined in the Criminal Procedure Code and no doubt it was advisedly left undefined. It is not intended to be interpreted in any artificial or technical sense. Common sense and the ordinary use of language must decide whether on the facts of a particular case we are concerned with one transaction or several transactions. In that connection I may refer to the observations of Reilly, J., in In Re: Gam Mallu Dora alias Malayya and Others, and also to In re Ramaraja Tevan. 53 M 931 : (1930) M W N 377 : Ind. Rul. (1930) Mad. 1038 : (1930) Cr. Cas. 1033 : 32 L W 894 : 59 M.L.J. 945.

5. Let us then look at the case first from the commonsense point of view apart from any authority and let us assume for the purpose of argument that the prosecution story is true. What happened, it seems to me, must nave been something like this: the accused conceived the idea of getting spurious ticket books printed, disposing of them as if they were genuine books and pocketing the proceeds. In accordance with that scheme accused No. 2 goes to the Caxton Press and orders 200 books. They are supplied, stamped with the Settlement stamp, or possibly a replica of it, and sold in the ordinary way either in the office or outside it. The books are presented by the purchasers at the. water stations and accepted without suspicion. The accused have received the money and they keep if. Finding that, the scheme has succeeded without any hitch, they decide to repeat the procedure. A further consignment of books is ordered and dealt with in the

same way. With occasional intervals, as for instance, when No. 2 was sick at the beginning of 1934, they went on ordering fresh consignments of books and disposing of them and pocketing the money for a period of nearly two years until the fraud was discovered in February 1935. Describing that state of affairs in ordinary language, I think one would caff it not one transaction but a series of transactions. All the offences committed in connection with any one consignment of books, forgery, misappropriation, cheating and so on, would no doubt be part of the Same transaction; but the offences committed in connection with any other consignment of books would, in my opinion, not be part of the same but of a similar transaction.

6. As the section itself says, in order that a series of acts be regarded as the same transaction, they must be connected together in some way. The Courts have indicated various tests to be employed to decide whether different acts are part of the same transaction or not, namely, proximity of time, unity of place, unity or community of purpose or design and continuity of action. There are numerous cases on this point. I need only refer to Choragudi Venkatadri v. Emperor 33 M 502 : 5 Ind. Cas. 817 : 11 Cr. L J 258 : (1910) M W N 63 : 7 M L T 299 : 20 M.L.J. 220 a case which has been frequently followed, In Re: Gam Mallu Dora alias Malayya and Others, , and Emperor v. Sherufalli 27 B 135 4 Bom. L R 930. Proximity of time is not essential, though it often furnishes good evidence of what unites several acts into one transaction and, as Illus, (d) to Section 235 snows, it may often be a very important factor in determining whether different offences of the same kind are to be treated as part of one transaction, that is the case of a man found in possession of several counterfeit seals intending to use them for the purpose of committing several forgeries. Mr. Justice Krisanan in In Re: Gam Mallu Dora alias Malayya and Others, , says that generally he agrees with the observations of the Judge in Choragudi Venkatadri v. Emperor 33 M 502 : 5 Ind. Cas. 817 : 11 Cri. L J 258 : (1910) M W N 63 but opines that unify of place and proximity of time are not important tests at ail. According to him the main test is unity of purpose, though he says that continuity of action goes with it. That, I think, is a very important qualification, for it is obvious that there may bo unity or community of purpose in respect of a series of transactions or several different transactions, and, therefore, the mere existence of a common purpose cannot by itself be enough to convert a series of acta into one transaction. I think the observations of Abdur Rahim, J., in Choragudi Venkatadri v. Emperor 5 Ind. Cas. 817 are very important in this connection. He says (p. 507 page of 33 M --[Ed].):

As regards community of purpose I think it would be going too far to lay down that the more existence of some general purpose or design such as miking money at the expense of the public is sufficient to make all acts done with that object in view, part of the same transaction. if that were so, the result would be startling; for instance, supposing it is alleged that a for the sake of gain has for the last ten years been committing a particular form of depredation on the public, viz., housebreaking and theft, in accordance with one consistent systematic plan, it is hardly conceivable that he could be tried at one trial for all

the burglaries which he committed within the ten years. the purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain amount falsifies books of account or forges a number of documents. in the present case not only is the common purpose alleged too general and vague but there cannot be said to be any continuity of action between one act of misappropriation and another. each act of misappropriation was a completed act in itself and the original design to make money was accomplished so far as the particular sum of money was concerned, when the misappropriation took place.

7. That was a case in which it was alleged that a company was formed with the object of defrauding the public in a particular manner and the promoters of the company were charged with several distinct acts of embezzlement committed in the course of several years. these acts were all committed in prosecution of the general object for which the company was founded. but it was held nevertheless that they were not parts of the same transaction and could not be joined in the same charge. the ratio decidendi of the judgment in this case appears to me to apply very closely to the facts of the present case. it seems, therefore, that the main test must really be continuity of action. we have to consider what that expression means. it cannot mean, i think, merely doing the same thing or similar things continuously or repeatedly, for a recurring series of similar transactions is not according to the ordinary use of language, the sane transaction. Continuity or action in the context must, in my opinion, mean this: the following up of some initial act through all its consequences and incidents until the series of acts or group of connected acts comes to an end, either by attainment of the object or by being put an end to or abandoned. if any of those things happens and the whole process is begun over again, it is not tie same transaction but a new one, in spite of the fact that the si me general purpose may continue. so that, i think, if we apply the recognised tests, the procuring of 4, 100 books of tickets to be printed at internals from may, 1933, to February, 1935, and the disposing of them and misappropriating the proceeds is not one transaction but a series of similar transactions. it might well be different if the prosecution had alleged a conspiracy between the accused to print 4,100 books from the beginning. but there is no such charge, and, as far as i can see, that is not really the prosecution case. At any rate it is perfectly consistent with the prosecution case as presented in the evidence that the accused ordered a fresh supply of ticket books when the last was exhausted without any definite idea as to the extent of their operations, other than the obvious and natural limitation that they would not be likely to continue once they were found out.

8. Now every case depends on its own facts and none of the authorities cited to us has any close bearing on the present case so far as the facts are concerned. The case of Chorgudi Venkatadri v. Emperor 5 Ind. Cas. 817 : (1910) M W N 63: 20 M.L.J. 220 is perhaps the nearest. If i may suggest an analogy it would be this: suppose a man were to forge a railway season ticket and use it daily, it may be, for a period of three months without being detected; suppose that having succeeded in doing that he were then to

forge a new season ticket for the following quarter and were to continue to do that with impunity say for a period of two years. On the arguments which have been addressed to us on behalf of the crown in this case it would be permissible to prosecute and charge such a man at one trial for forging eight season tickets and cheating the railway administration of the value of those tickets. But i think that would be obviously impossible. The forging of each particluar ticket together with its consequences would be a single transaction. In the present case the line of demarcation between the different transactions is not so clearly cut, but the principle seems to me to be the same.

9. The learned government pleader has cited three cases u/s 239 of the code: Emperor v. Datto Hanmant 7 Bom. L R 633 Emperor v. Ganesh Narayan 14 Bom. L R 972 : 17 Ind. Cas. 705 : 13 Cr. L J 833 and Emperor v. Madhav Laaman 48 Ind. Cas. 871. It is true that the same words ""the same transaction" occur in this section, but it deals with the joinder of several accused persons, not with the joinder of charges, and the cases, in my opinion, do not assist in our particular difficulty, which is whether the repetition of the same coarse of action over a long period is to be treated as a single transaction. Reliance has also been placed on In Re: Gam Mallu Dora alias Malayya and Others, , to which I have already several times referred. In that case the accused were charged with the offence of waging war u/s 121, Indian Penal Code, and it was held that, as the waging of war is a continuing offence, a charge under that section specifying more than three offences committed in the course of the war and spread over a period more than one year does not contravene the provisions of the Code and is not illegal. But it is hardly necessary to say that forgery is not a continuing offence. You cannot prosecute a man for a career of forgery, or a course of forgery, and there is nothing in Krishnan, J"s judgment in that case which really helps the prosecution here. There was in that case continuity of action during recognisable limits, that is to say, the course of a rebellion against the State. Now I can find no such connecting line here. In fact the only connecting line is the general purpose to defraud the Aden Settlement in a particular manner, which I. think is not enough.

10. The charges against the accused in repeat of the forgery of 4,100 books during the period of May 1930 to Feburary 1935, are therefore illegal and contrary to the provisions of Sections 235. Moreover, the illegality affects all the other charges. It is true that Section 222 of the Code allows a charge to be framed in respect of the gross sum misappropriated during a period of one year, and the form of the first charge in each case is presurmbly based upon that. But this charge can only be joined with the other charges at the same trial if the offences of misappropriation formed part of the same transaction with the offences of forgery. The same applies to the charges of cheating also.

11. If was held by the Privy Council in Subramania Iyer v. Emperor 28 I A 257 that where an accused was cnarged on an indictment alleging forty-one acts extending over a period of two years the trial was plainly prohibited by the Code and illegal and that the conviction mast be set aside. It has usually been held on the authority of this case that where there has been misjoinder of charges of this kind the whole trial is vitiated and the conviction must be set aside quite apart from any question of prejudice to the accused. As I pointed

out recently in Emperor v. Krishnaji Dange 34 Bom. L R 580 : 138 Ind. Cas. 520 : Ind. Rul. (1932) Bom. 383 it is not altogether clear from the language used by their Lordships that they intended to go so far as that. In a later case AIR 1927 44 (Privy Council) , Subramania Iyer v. Emperor 28 I A 257 was referred to and distinguished on the ground that the procedure adopted was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. On the authority of this later case it has been held in In re Ramaraja Thevan 127 Ind. Cas. 634 that Section 537, Criminal Procedure Code, affords no real ground for the assumption that if a mandatory provision of the Code is infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused, and the impugned procedure must be one that is not only prohibited by the Code but also works an actual injustice to the accused. However that may be, whenever you have a joinder of charges prohibited by the law of procedure particularly when you have evidence called to prove the commission of offences extending over a long period, it is always extremely difficult to feel confident that the accused has not been prejudiced. Supposing the charges against the accused had been confined to the forgery of one consignment or three consignments of these ticket books within a period of one year, in that case the other charges of using the forged tickets, or misappropriating the money, and of cheating the Aden Settlement, would have had to be similarly limited and connected with the particular consignment or consignments of books mentioned in the charge. It might well be that the prosecution would have found it difficult or even impossible to establish that any particular person was responsible for the misappropriation or the cheating in respect of that particular lot of books and it might have been necessary to confine the charge to the forgery only.

12. In the present case both the accused have been charged with and found guilty of misappropriating a large sum of money during the whole year and with cheating the Aden Settlement in respect of the same total sum. No doubt the charge also says "or a portion thereof," but that can make no real differ, ence. It is impossible to say, under these circumstances, that the accused have not been prejudiced by the nature of the charges framed against them and the way in which the case was tried. Without therefore necessarily deciding that breach of the provisions of Section 235 in itself necessitates the quashing of the convictions, we feel that in the present case we have no alternative but to take that course. we must, therefore, quash the convictions on all these charges against both the accused. we direct that accused no. 2, who has admitted that he ordered the spurious books, should be re-tired on such legal charges as may be preferred against him. We do not propose to order the re-trial of accused no. 1, because, for the reasons which i now proceed to give, we are not satisfied that the prosecution has succeeded in establishing their case against him on the merits. (his lordship then dealt with the circumstances appearing in the prosecution evidence against accused no. 1, and proceeded). Before discussing the evidence of the defence witness on whom the learned sessions judge has relied against accused no. 1, I must first deal with Mr. Carden Noad''s point that this evidence is not admissible against his client. The only authority on the question in the authorised reports seems to be Ram Chand Chatterjee v. Hanif Sheikh.

21 C 401 and that is not directly in point. It was held there that an accused person may cross-examine a witness called by a co-accused for his defence when the case of the second accused is adverse to that of the first. But that implies of course that the evidence of such a witness may be taken into consideration, against an accused person other than the one who calls the witness, and that indeed is the principal ground for the decision. We think it is impossible to say that there is anything in the law of evidence or procedure which renders the statements of witnesses produced by one accused inadmissible against a co-accused, but at the same time there are obvious reasons for receiving such evidence with great caution, and indeed for regarding it with great suspicion, when, as here, the witnesses have little or nothing to say which benefits the person who calls them and appeared to be introduced merely with the object of strengthening the ease against the co-accused. as the learned Counsel for appellant no. 1 points out the co-accused is under a serious disability in such a case. If the witnesses have been examined by the police as some of them in this case were, he is deprived of the privilege of contradicting them by their former statements Section 162, criminal procedure code, only applies to prosecution witnesses. He may also be deprived of the benefit of Section 342 of the code, for, though the court may give him an opportunity of making a statement about the evidence, that is not obligatory under the terms of the section. In this case accused No. 1 was not given any opportunity of saying what he had to say about these witnesses called by accused No. 2 notwithstanding the fact that the judge attached great importance to their evidence.14. a further consideration may be mentioned of a more general nature. In a public prosecution the crown may be expected to produce all the available evidence which has a material bearing on the charges and which the prosecution is prepared to rely upon to establish those charges. One may expect that this will be done without fear or favour, malice or ulterior motive of any kind, simply with the object of placing the true facts before the court. The value of this guarantee of good faith may vary no doubt. But in the case of defence witnesses there cannot be any such guarantee at all, and there is nothing to prevent one accused person who may think his own case hopeless, producing, evidence with the sole object of gratifying his spite against a co-accused. (his lordship then considered the defence evidence led by accused No. 2 in and concluded). In our opinion, if we had not found it necessary to quash the convictions on the ground that the charges are illegal, accused no. 1 would have been entitled to an acquital on the evidence. Accused No. 1 should be at once released. Accused No. 2 should be released pending the re-trial, if any, on the same bail.

Divatia, J.

13. I agree.