

Rex Vs. Daya Shankar Jaitly

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Court : Allahabad

Decided On : Sep-09-1949

Reported in : AIR1950All167

Judge : Agarwala and ;P.L. Bhargava, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 222, 222(2), 223, 225, 233, 234, 235, 236, 239, 252, 307 and 328; Indian Penal Code (IPC) - Sections 408 and 477A; [Evidence Act, 1872](#) - Sections 33

Appeal No. : Criminal Ref. No. 860 of 1948

Appellant : Rex

Respondent : Daya Shankar Jaitly

Advocate for Def. : M.L. Chaturvedi, Adv.

Advocate for Pet/Ap. : D.P. Uniyal, Assistant Government Adv.

Judgement :

Agarwala, J.

1. This is reference, under Section 307, Criminal P. C., by the learned Additional Sessions Judge of Kanpur. Daya Shankar Jaitly, the opposite party, was tried with the aid of a jury for an offence under Section 477A, Penal Code, and, in the

alternative, for an offence under Section 408, Penal Code. The jury returned a verdict of not guilty on both the charges. As the learned Sessions Judge did not agree with the verdict of the jury, he made a reference to this Court.

2. The prosecution case briefly put was as follows: The accused Daya Shanker Jaitly was employed as a cashier in the office of the Garrison Engineer at Kanpur. As a cashier, it was his duty to write the cash book showing correctly the state of income and expenditure from day to day. He used to keep the cash book with him and also handled the cash. He made false entries in the cash book showing inflated amounts of expenditure, whereas in fact smaller amounts were spent or no amount at all. In this way, he committed a criminal breach of trust in respect of Rs. 74,200 between 11th May 1945 and 7th December 1946.

3. The falsification of the cash book and the misappropriation of the amount was not noticed for a long time. On 14th January 1947, the Garrison Engineer made a report to the Station Officer, Police Station Cantonment, Kanpur, that on going through the accounts, registers that morning, he had discovered that Mr. D. S. Jaitly, employed as cashier, had been misappropriating Government money and that the exact amount was not known. An examination of the account-books was then made and the Local Audit Officer calculated that embezzlements amounted to Rs. 74,200.

4. The Committing Magistrate framed a charge under Section 477A only and not under Section 408, Penal Code. Several prosecution witnesses were examined in Court including Mr. H. C. Thorpe, Garrison Engineer.

5. When the case came up before the Session Court, the learned Judge amended the charge by adding a charge 'in the alternative' under Section 408, Penal Code. The amended charge read as follows:

'I, B. G. Singh, hereby charge you Daya Shanker Jaitly as follows:

That you between 11th May 1945 to 10th December 1946 being the cashier to the office of the Garrison Engineer, Kanpur, wilfully and with intent to defraud altered cash figures in cash books Exs. P-19, P-20, P-27, P-37, P-51 and P-60 which

belonged to office of the Garrison Engineer where you were employed as a cashier clerk, and thereby committed an offence punishable under Section 477A, Penal Code, and within the cognisance of the Court of Sessions.

In the alternative:

That you being a clerk in G. E. Kanpur's office an being entrusted in such capacity with money or with dominion over money committed criminal breach of trust, between 20th November 1945 and 8th November 1946 of amount below Rs. 45,002-10-0, and thereby committed an offence punishable under Section 408, Penal Code.'

6. A few points may be noted with regard to the charge. In the first place, the charge under Section 477A was in respect of six cash books and the items in respect of which cash books were alleged to have been falsified were 46 in number. In the second place, the period during which the fraudulent entries were made was more than one year. It was for one year and seven months. In the third place, no specific entries, which were alleged to have been altered or fraudulently made, were specified.

7. As observed already, the jury returned a verdict of not guilty on both the charges and the learned Sessions Judge, disagreeing with the verdict of the jury, made a reference to this Court.

8. Learned counsel appearing for the accused has urged that the charge under Section 477A being not limited to the period of one year and not having been limited further to only three items, the trial was in direct contravention of the provisions of Sections 233 and 234, Criminal P.C. and, as such, the proceedings should be quashed and the accused acquitted. He further urged that the charge under Section 477A did not specify the items in respect of which the falsification or alteration was made and as such also the charge was bad. He has also urged that the charge of falsification under Section 477A could not be combined with the offence of dishonest misappropriation of money under Section 408, Penal Code, and that, in any case, the learned Sessions Judge had no jurisdiction to frame a charge under Section 408 in the alternative, as there was no evidence before the

Committing Magistrate in proof of the guilt of the accused under Section 408, Penal Code.

9. The relevant sections of the Criminal Procedure Code are quoted below:

Section 222. (1) 'The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of Section 234:

Provided that the time included between the first and last of such dates shall not exceed one year.'

Section 223. 'When the nature of the case is such that the particulars mentioned in Sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.'

Section 225, 'No error in stating either the offence or the particulars required to be stated in the charge, and no omission 'to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.'

Section 233. 'For every distinct offence of which any person is accused 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 289.'

Section 234. (1) 'When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of

such offences, (whether in respect of the same person or not) he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law:

(Provided that, for the purpose of this section, an offence punishable under Section 379, Penal Code, shall be deemed to be an offence of the same kind as an offence punishable under Section 380 of the said Code, and that an offence punishable under any section of the Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence).'

Section 235. (1) 'If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with and tried at one trial for, each of such offences.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and to any offence constituted by any one, or more, of such acts.

(4) Nothing contained in this section shall affect the Indian Penal Code, Section 71.'

Section 236. '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.'

Section 239 deals with the joint trial of several persons and need not be quoted.

Section 537. 'Subject to the provisions hereinbefore obtained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. 27 or on appeal or revision on account:--

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

(b)..... .

(c) of the omission to revise any list of jurors or assessors in accordance with Section 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.--In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

We first proceed to consider the case of the charge under Section 477A, Penal Code.

10. The first part of the charge dealing with the offence under Section 477A mentions the alteration of 'cash figures in six cash books.' Since it was the alternation of the figures, the reference was to the entries in the cash books. The alteration of every item in the cash books constituted a separate offence within the meaning of Section 477A. Every item should, therefore, have been clearly specified in the charge. It was not enough to mention the cash books alone. It should be remembered that Sub-section (2) of Section 222, Criminal P. C., does not cover an offence under Section 477A, Penal Code. It covers an offence of criminal breach of trust or dishonest misappropriation of money only. It is only with

respect to a charge for criminal breach of trust or dishonest misappropriation of money that it is permissible to specify the gross sum in respect of which the offence is alleged to have been committed and the dates within which the offence is alleged to have been committed without specifying the particular items or exact dates. This rule does not apply to an offence of dishonest alteration or falsification of entries or books. But the omission of the details of particular items in respect of which the offence of falsification was alleged to have been committed may, however, be cured under Section 223, Criminal P. C., unless the accused was in fact misled by the error or omission and the error and omission occasioned a failure of justice. In the present case, all the items were specifically put to the accused when he was examined by the Committing Magistrate, He did not, at any stage, in the Court below, object to the frame of the charge. It cannot, therefore, be said that he was prejudiced, in any way, by the omission of the details of the entries in the charge.

11. The second defect in the charge was that more than three offences of the same kind were lumped together. Even if we assume that the different items in the cash books did not constitute separate offences, the alteration of every cash book at least constituted one separate offence. The charge specified six cash books. Therefore, there were six separate offences of the same kind which were being tried together. Could this be done? As observed already, Section 222 (2) does not apply to a charge under Section 477A. Even if it could apply, the charge would still be bad as the various offences lumped together covered a period of more than one year.

12. Under Section 233, for every distinct offence of which a person is accused, there shall be a separate charge and every charge shall be tried separately except in the cases mentioned in Sections 234, 235 and 239. For the purposes of the present argument, we are concerned only with Section 234, as the only other section which could be called 'in aid' was Section 235 on the ground that all the falsifications constituted 'one series of acts so connected together as to form the same transaction.' But on behalf of the Crown, it was not suggested that in the present case all the acts complained of formed part of one transaction. Indeed, on the facts alleged that could not be so and the matter is fully covered by several

decisions of the Courts in India. We may only refer to a case of our own Court reported in *Emperor v. Bishan Sahai Vidyarthi* : AIR1937 All714 .

13. Under Section 234 a person accused of more offences than one of the same kind can be tried for three such offences at the most and those three offences must have been committed within a space of 12 months from the first to the last offence. The charge in the present case having combined more than three offences of the same kind was in direct contravention of Section 234, Criminal P. C. As observed already, no objection was taken to the frame of the charge and to the lumping up of more than three offences in one charge. Learned counsel for the accused was not able to suggest as to how and in what respect his client was prejudiced by the trial. We do not think that any prejudice was in fact caused to the accused by the mode of the trial. But learned counsel argues that irrespective of the question of prejudice to the accused the trial, being in contravention of a mandatory provision of law, was bad and the defect cannot be cured by Section 537, Criminal P. C. We have, after giving our anxious consideration in the matter, come to the conclusion that the contention of learned counsel must prevail.

14. The point under discussion is fully covered by a decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar v. King Emperor*, 25 Mad. 61: (28 I. A. 257 P. C.). The facts of that case were very similar to the facts of the present case. In that case one Subrahmania Ayyar, Superintendent of the Military Accounts Department, was tried along with one D'Santos, a Supervisor of the same department and subordinate to the former. The indictment contained seven counts. The first count stated that the accused did conspire and combine together for the purpose of extorting money and obtaining illegal gratifications from the clerks in the accounts branch of the Military Accounts Department and so obtained diverse sums of money within a period of two years on 41 different occasions. The second, fourth and sixth counts charged Subrahmania Ayyar with having on three occasions dishonestly induced one Balasundara Mudali to pay certain sums. The third, fifth and seventh counts charged D'Santos with having abetted the appellant in the commission of the offences set out in the second, fourth and sixth counts. Subrahmania Ayyar objected to the joining together of the various charges in the first count and the joining together of the first count with the second, fourth and

sixth counts. The learned trial Judge overruled the objection and convicted Subrahmania Ayyar on the various counts. The matter came up before a Full Bench of the Madras High Court. There was a difference of opinion as to whether the first count was good. Three Judges held that it was good and three Judges held that it was bad. All the Judges, except one, however, held that whether it was good or bad, its union with the remaining counts made the whole indictment bad for misjoinder. But then all the Judges, except one, thought that it was open to them to strike out the first count and deal with the evidence applicable to the remaining counts. Ultimately the conviction of Subrahmania Ayyar on the sixth count was held to be proved. On the case coming up before the Judicial Committee, it was held that the trial on the first count in which the accused was charged with no less than forty-one acts, these acts extending over a period of two years, was in direct contravention of Section 234, Criminal P. C. Their Lordships observed:

'The reason of such a provision (namely Section 234), which is analogous to our own provisions in respect of embezzlement, is obviously in order that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of stances of culpability and the consequent embarrassment both to Judges and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all criminal procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of criminal procedure.'

Their Lordships further observed :

'The course pursued and which was plainly illegal cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury.

Upon the assumption that the trial was illegally conducted it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the multitude of charges

before the jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty only to such parts of the written accusation as ought to have been submitted to the jury.'

With regard to Section 537, their Lordships observed: 'Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment

The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity.'

15. Subrahmania Ayyar's case (25 Mad. 61: 28 I. A. 257 P. C.), was again referred to by their Lordships in the case of Abdul Rahman v. Emperor . In that case, at the trial depositions of the witnesses for the prosecution were recorded in English. Some of the witnesses knew English and others did not. At the conclusion of the evidence of English knowing witnesses, their depositions were handed over to them and the witnesses read them over to themselves. The depositions of the witnesses, who did not know English, were interpreted to them by an interpreter, and while such reading was over and interpretation was going on, the Magistrate went on recording the depositions of other witnesses. There was consent of the counsel for the accused for the procedure adopted by the Court. The procedure was, no doubt, in contravention of Section 360, Criminal P. C. which provided that the depositions of witnesses should have been read over and explained to them in the presence of the accused or his pleader. There was thus a breach of the directory provision of the Criminal Procedure Code for which there was a consent of counsel. Their Lordships held that 'non-compliance with the strict provisions of Section 360, Criminal P. C., only amounted to an irregularity and was cured by Section 537 of the Code.' Referring to Subrahmania Ayyar's case: (25 Mad. 61: 28

I. A. 257 P. C.), however, it was observed :

'There the trial of a man on charges of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences and those committed -within a period of 12 months, was held bad, and the conviction was quashed because the provisions of Section 537 of the then Criminal P. C., did not cure it.

The distinction between that case and the present is fairly obvious.. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.'

It will be observed that their Lordships, in no way, dissented from the decision of Subramania Ayyar's case, (25 Mad. 61 : 28 I. A. 257 P. C.). Their Lordships pointed out the distinction between a case in which a directory provision was contravened and a case in which a positive prohibition contained in the Code was disregarded, Having done that, their Lordships also added en-passant that 'it was possible that it (the procedure adopted in Subramania Ayyar's case, (25 Mad. 61: 28 I. a. 257 P. C.)) might have worked actual injustice to the accused.' This clause left room for misconstruction of all that had been previously stated.

16. The matter was considered by a Full Bench of this Court in the case of Kapoor Chand v. Suraj Prasad : AIR1933 All264 . The Bench consisted of Mukerji A. C. J., Young and King JJ. The judgment of the Court was delivered by Mukerji Ag. C. J. In that case one Sarju Prasad, as the servant of one Chuni Lal Garg filed a petition under Section 145, Cr. P. C. The petitioner said that his master Chunnalal was in possession of a house in the city and the opposite parties were trying to interfere with the possession of his master and that there was a likelihood of a breach of the peace. The Magistrate took down the statement of Sarju Prasad on oath and directed a police enquiry into the matter. On receipt of the police report, he passed an order in which he observed that there appeared to be some basis for the complaint to judge from the police report, and that as he was unable, owing to pressure of work, to dispose of it himself, he was transferring it for such action as might be thought fit to another Magistrate. The Magistrate to whom the case was

transfer. red issued notice to the opposite party. Notice was issued to the opposite party under Section 145, Cr. P. C. and the Magistrate, after written statements were filed and evidence was recorded, directed that the applicant Sarju Prasad's master be put in possession of the property. One of the points urged before the Pull Bench was that the second Magistrate, who issued notice under Section 145, Criminal P. C., had no jurisdiction to issue the notice as he did not strictly comply with the provisions of Section 145, Criminal P. C. It was held by the Full Bench that, although the Magistrate did not comply with the provisions of Section 145, Criminal P. C., he had jurisdiction to issue notice and any defect in the procedure adopted by him was cured by Section 537 of the Code. In the course of the judgment, however, referring to the Privy Council cases of Subramania Ayyar (25 Mad 61: 28 I. A. 257 P. C.) and Abdul Rahman it was observed :

'It may be that their Lordships of the Privy Council, in the later case, wanted to point out that Section 537, Criminal P. C. could not cure the defect in the case of Subramania Ayyar, (25 Mad 61 : 28 I. A. 257 P. C.) because the Code contained the provision that an irregularity, which had worked injustice to the accused, could not be cured. But it is significant that although their Lordships of the Privy Council drew a distinction between an 'illegality' and an 'irregularity' in the earlier case, which was decided in the year 1901, the legislature did not introduce the word 'illegality' in Section 537 or anywhere else in the Code, although it was amended after that year. This being the state of the law, we do not think that we should introduce a distinction between 'illegality' and 'irregularity.' The sole criterion given by Section 537 is whether the accused person has been prejudiced or not. The object of procedure is to enable the Court to do justice, but, if in spite of even a total disregard of the rules of procedure, justice has been done, there would exist no necessity for setting aside the final order which is just and correct simply because the procedure adopted was wrong.'

17. Learned counsel for the Crown has placed great reliance upon these observations in the Full Bench case and has urged that Subrahmania Ayyar's case (25 Mad 61: 28 I. A. 257 P. C) no longer holds the field. We do not think that the observations of their Lordships of the Privy Council in Abdul Rahman's case or the observations of the Pull Bench have any such effect. In the Full Bench case it was

pointed out :

'There are two things--one is the authority conferred on him to act and the other is how he is to act. If he has jurisdiction, he is not deprived of jurisdiction merely because his procedure is erroneous or defective.'

In Subrahmaniam Ayyar case, (25 Mad. 61 : 28 I. a. 257 P. C.) it was clearly pointed out that the trial in that case 'was prohibited in the mode in which it was conducted.' From these observations, we think that their Lordships meant to lay down that the Magistrate had no jurisdiction to hold the trial in the mode in which he did. In our opinion, apart from the observations relating to the difference or non-difference between 'illegality' and 'irregularity', the decision of the Full Bench upon its own facts is not at all inconsistent with the decision of the Privy Council in Subrahmaniam Ayyar's case, (25 Mad. 61 : 28 I. a. 257 P. c.). A case is after all an authority for what it actually decides and the general observations made in it should be read with reference to its own facts. We do not think that there is anything in the Full Bench decision of this Court which compels us to hold that we are not bound by the Privy Council decision in Subrahmaniam Ayyar's case, (25 Mad. 61 : 28 I. A. 257 P. C.).

18. It appears, however, that in three Division Bench decisions of this Court, namely, Lala v. Emperor : AIR1933 All941 ; Mathuri v. Emperor : AIR1936 All337 and Emperor v. Bishan Sahai : AIR1937 All714 , reliance was placed upon the observations of the Full Bench quoted above and it was held that there was no difference between an 'illegality' and an 'irregularity' and that Section 537 applied to all illegalities. We would have felt compelled to refer this case to a larger Bench if it were not that two later decisions of the Privy Council have considered this matter and the latest decision has thrown light upon the meaning of the two earlier Privy Council decisions and, far from holding that Subrahmaniam Ayyar's decision (25 Mad. 61 : 28 I. a. 257 P. C.) is no longer good law, re-established its authority.

19. In the case of Babulal Choukhani v. Emperor , the Privy Council observed :

'It has been taken as settled law on all sides throughout these proceedings that the infringement of Section 239 (d) would, if made out, constitute an illegality, as

distinguished from an irregularity, so that the conviction would require to be quashed under the rule stated in Subramania's case, (25 Mad. 61: 28 I. A. 57 (P. C.)) as contrasted with the result of an irregularity, as to which Abdul Rahman's case is an authority. Their Lordships will assume that this is so, without thinking it here necessary to discuss the precise scope of what was decided in Subramania's case, (25 Mad. 61 : 28 I. A. 257 (P. C.)) because in their understanding of Section 239 (d) that question does not arise.'

20. In the case of Pudukuri Kottaya v. Emperor, 1947 A. L. J. 355 : (A. I. R. (34) 1947 P. C. 67 : 48 Cr. L. J. 533), the Privy Council observed :

'When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subrahmania Ayyar's case: (25 Mad. 61: 28 I. A. 257 P. C.)) the trial is bad, and no question of curing an irregularity arises, but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between -an illegality and an irregularity is one of degree rather than of kind.'

21. This last decision of the Privy Council is binding on us and is a clear exposition of the scope of Section 537, Criminal P. C. The distinction between Subrahmania Ayyar's case : (25 Mad. 61: 28 I. A. 257 P. C.) and Abdul Rahman's case has been clearly brought out. Subrahmania Ayyar's case : (25 Mad. 61: 28 I. A. 257 P. C.) dealt with an illegality which went to the root of the matter because the trial was conducted in a manner different from that prescribed by the Code. In Abdul Rahman's case though there was a breach of one or more provisions of the Code, the trial was substantially in the manner prescribed by the Code. The actual decision in the Full Bench case of Kapoor Chand v. Suraj Prasad : AIR1933 All264 still stands good and the observation that Section 537, Criminal P. C., includes not merely irregularities but some illegalities also holds good. But it must be observed that all illegalities are not covered by Section 537. As pointed out by the Privy Council, such illegalities as substantially affect the mode of trial adopted by the

Court, are not cured by Section 537. If there is anything in the Full Bench case suggesting the contrary, it is obiter and is not of binding authority specially in view of the latest pronouncement of the Privy Council.

22. We think that the trial in the present case was conducted in a manner not warranted by the Criminal Procedure Code and was wholly bad irrespective of the question whether there was any actual prejudice to the accused or not.

23. We next proceed to consider the question of joinder of charges under Sections 477A and 408, Penal Code.

24. The further objection to the mode of trial adopted by the learned Sessions Judge is to the effect that the offence under Section 477A, Penal Code as mentioned in the charge, could not be combined with the offence under Section 408, Penal Code. It is urged that Sections 234, 235 and 286, Criminal P. C., are mutually exclusive and cannot be read as supplementing each other.

25. The general rule mentioned in Section 283 is subject to the exceptions mentioned in 'Sections 234, 235, 236 and 239.' It is a general rule of construction that the provisions of an Act of the legislature must be read as a whole, and in the absence of anything showing a contrary intention, every part of it must be read as supplementing and completing the other part. There is nothing in Section 283 to indicate that Sections 234, 235, 236 and 239 cannot be read together. An examination of the provisions of these sections leads to the conclusion that the legislature intended that they should be read as supplementing each other.

26. The principle underlying Section 234 is that offences of the same kind committed within the space of a short period, namely, of one year, and consisting of a few transactions, namely, three transactions, are not expected to prejudice the trial of the accused and so may be tried together. But more transactions than three extending over a larger period may not be so tried together.

27. The principle underlying Sections 235 and 286 is that if more offences than one are committed in one transaction, or 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 can be tried at one trial. The reason is that when the transaction is one, the evidence in proof of it will be the same, whatever be the nature of different Offences committed by means of that transaction, and in such a case the legislature considers that there is no harm in combining the trial of different offences either cumulatively or alternatively when the transaction is the same. In all such cases the main offence usually committed is one and the other offences are subsidiary ones. If it is considered advisable to try the subsidiary offences along with the main offence arising out of the same transaction, it does not stand to reason that these subsidiary offences, which go along with the main offence as part of the same transaction, may not be tagged on to the main offences, when three such main offences are considered by the legislature to be fit for joint trial under Section 234. The combination of the subsidiary offences with the main offence is no more likely to confuse the jury or the Judge or to prejudice the accused than the trial of the three main offences themselves, because in both the cases the evidence will be the same. Even if the offences cannot be described as main or primary and secondary, the principle remains the same. Indeed, if the rule were otherwise, unnecessary multiplicity of proceedings and duplication of evidence and waste of public time and even harassment of the accused may be the result, In our opinion, Sections 234, 235, 236 and 289 ought to be read as supplemental and not as exclusive of one another.

28. The view we have expressed above finds support from the following cases, Gajadhar Lal v. Emperor, A. I. R. (7) 1920 Pat. 775 : (22 Cr. L. J. 230) ; Michael John v. Emperor, A. I. R. (18) 1931 Pat. 349 : 10 Pat. 463 : (32 Cr. L. J. 1026); Shib Charan v. Emperor : AIR1931 All49 , Ram Kishoon Pd. v. Emperor, A.I.R. (21) 1934 Pat. 232: 13 Pat. 170: (35 Cr. L. J. 876) ; Emperor v. Ram Autar Lal, A. I. R. (29) 1942 Pat 401 : 21 Pat. 113 : (43 Cr. L. J. 625) ; Keshav Lal Tribhuvandas v. Emperor A. I. R. (31) 1944 Bom. 306 : (I.L.R. (1944) Bom. 728) and In re Bal Gangadhar Tilak, 33 Bom. 221: (9 Cr.L.J. 226). In Kashi Ram Jhunjunwala v. Hardat Rai Gopal Rai : AIR1935 Cal312 , it was held that if there was one charge of criminal breach of trust in respect of a lump sum of money made up of three different items under Section 408, Penal Code, the three different charges under Section 477A in respect of the items covered by the lump sum may be linked with

one charge under Section 408, Penal Code.

29. We find ourselves unable to accept the contrary view taken in some other cases. In *Emperor v. Sheo Saran Lal*, 32 ALL. 219 : (5 I. C. 896), Tudball J. considered that Sections 234 and 235 must be deemed to be exclusive. In *Emperor v. Shujauddin Ahmad*, 44 ALL. 540 : (A. I. R. (9) 1922 ALL. 214 : 23 Cr. L. J. 258), a learned single Judge of this Court followed the decision of the single Judge in *Emperor v. Sheo Saran Lal*, 32 ALL. 219: (5 I.C. 896). The case reported in *Becharam v. Emperor* : AIR1944 Cal224 is distinguishable. In that case the facts were that the accused was charged with three offences of theft and three offences of dishonest misappropriation of money in the alternative. It was found that the three charges did not relate to one offence, but to a number of distinct and separate offences and, therefore, it was held that the accused was charged with and tried for more than three offences of the same kind and that the trial was contrary to Section 234. The learned Judges observed that in view of the observations regarding the applicability of Section 234, the question whether Sections 234 and 236 could be combined, did not arise in that case, In *Kasi Vishwanadhan v. Emperor*, 30 Mad. 328 : (5 Cr. L. J. 341), Sections 234 and 235 were considered separately and the question whether they could be read as supplemental of each other was not considered.

30. In our view the 'charge or charges for criminal misappropriation in respect of three items may be linked with three charges for falsification of accounts arising out of the same three transactions.

31. In the present case, however, the charges both under Sections 477A and 408 covered more than three transactions. Their joinder at one trial was, therefore, illegal.

32. The next point urged was that the learned Sessions Judge had no power to add a charge under Section 408 when the same had not been framed by the Committing Magistrate. This argument is based on the assumption that there was no evidence before the Committing Magistrate on which he could have framed a charge under Section 408, Penal Code. We think that this contention has no force. There was on the record the statement of Mr. Thorpe, Garrison Engineer, which, if

believed, could be taken to prove the charge under Section 408. The learned Sessions Judge, therefore, had jurisdiction to add the charger under Section 408, Penal Code.

33. We have next to consider whether we should order a retrial of the accused or not. Ordinarily, we would not have ordered a retrial when the accused had been tried and found not guilty by the jury, even though the trial was vitiated. In this particular case, however, there is one circumstance which has weighed with us in considering this matter. Mr. Thorpe, Garrison Engineer, was examined by the Committing Magistrate. He was cross-examined, though not to a large extent, by the accused. When the case came up for trial before the Sessions Judge, he was not available as he had gone to Australia. We are informed that the evidence of Mr. Thorpe was not taken on the record by the learned Sessions Judge and so was not placed before the jury for their consideration along with the other evidence. The reason for this step, we are informed, was that the Committing Magistrate tried the case as a warrant case in the first instance and examined Mr. Thorpe under the provisions of Section 262, Criminal P. C. As it was thought that under Section 252, Criminal P. C., the accused had no right of cross-examination, the evidence of Mr. Thorpe was considered to be inadmissible in evidence in the Sessions Court under the provisions of Section 33, Evidence Act. A single Judge's decision of this Court undoubtedly is in support of the view that seems to have been taken by the learned Sessions Judge, vide *Laxmi Narain v. Emperor* : AIR1931 All621 . The Calcutta High Court has also expressed a similar view, *C. A. Mathews v. Emperor* : AIR1929 Cal822 .

34. A contrary view has, however, been expressed in other Courts vide: *Lokly v. Emperor*, 43 Mad. 411: (A.I.R. (7) 1920 Mad. 201: 21 Cr. L. J. 297), *Varisi Rowther v. Emperor*, 46 Mad. 449 : (A. I. R. (10) 1923 Mad. 609 : 24 Cr. L. J. 547 F. B.), *Menon v. Krishna Nayar*, 49 Mad. 978 : (A. I. R. (13) 1926 Mad. 989 : 27 Cr. L. J. 1123), *Ramyad Singh v. Emperor* A. I. R. (7) 1920 Pat. 149 : (21 Cr. L. J. 814); *Muthiah Chetty v. Emperor*, A. I. R. (11) 1924 Mad. 735 : (25 Cr. L. J. 556); *Mohd. Rahim v. Emperor*, A. I. R. (22) 1935 Sind 13 : (36 Cr. L. J. 581 F. B.), *Gurudin v. Emperor*, A. I. R. (22) 1935 Nag. 8 : (36 Cr. L. J. 578), *Mohammad Ali v. Emperor*, 10 I. C. 917 : (12 Cr. L. J. 277). The question came up for decision before a Bench

of the Oudh Chief Court in Mohd. Husain v. Mirza Fakhrullah, 8 Luck. 185 : A. I. R. (19) 1932 Oudh 298 : (34 Cr. L. J. 58). The Judges constituting the Bench were divided in opinion.

35. Section 33, Evidence Act runs as follows: Section 33. 'Evidence given by the witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided that the proceeding was between the same parties or their representatives in interests;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.'

36. The question is whether in the proceeding in which Mr. Thorpe's statement was taken down, the accused 'had the right and opportunity to cross-examine'. He had undoubtedly an opportunity to cross-examine, The real point is whether he had the right to do so, It has been argued before us that before the framing of the charge, when the prosecution evidence is taken down under the provisions of Section 252, Criminal P. C., the accused has no right to cross-examine the prosecution witnesses. Section 252, Criminal P. C., runs as follows :

Section 253. (1) 'When the accused appears or is brought before a Magistrate such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.'

Then Section 256 provides:

Section 256. (1) 'If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross examine any, and, if so which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.'

37. The argument in favour of the view that the accused has no right of cross-examination before the charge is framed is based upon the circumstance that there is no mention of the right of cross-examination in Section 253, while the same is expressly mentioned later in Section 256. The fact that the right of cross examination is not expressly mentioned in Section 252 is of no significance whatsoever, because similar language has been used in Section 244 which refers to the trial of summons cases and provides as follows :

Section 244. (1) 'If the Magistrate does not convict the accused under the preceding section, or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.'

38. Section 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage and as no express provision is made for exercising this right in a trial of a summons case, it must be held that the right is exercisable under Section 244.

39. But the difference in a trial in a warrant case is that in Section 256 there is an express mention of the right of cross-examination by the accused. The question is not free from difficulty. We are inclined to the view that the accused has a right of cross-examination even before the framing of the charge at the stage

contemplated in Section 252, Criminal P. C., but we do not wish to express a definite opinion on the subject, as in the present case it is not necessary for us to do so.

40. Even though under the law the accused may not have a right of cross-examination of the prosecution witnesses when they are examined under Section 252, Criminal P. C., still in the present case the accused did get that right as the same was conferred on him by the Magistrate when he permitted him to cross-examine Mr. Thorpe. The permission of the Magistrate granted to the accused conferred a right upon the accused, even if there was none before. No doubt, sometimes the word 'right' is used in the sense of an absolute right in contradistinction with the word 'licence' or permissive right. A thing done under a licence or permission is sometimes said to be not a thing done as of right. But the word 'right' is not used in Section 33, Evidence Act, in that limited sense. It is used in its larger sense, in the sense of 'authority', 'competence' or 'power'. To be able to do a certain thing, this 'authority', 'competence' or 'power' may be acquired directly under some provision of law or by the permission of those authorised to give the permission and to make the doing of that lawful and rightful which otherwise would have been unlawful or wrongful. Once the permission to cross examine was granted by the Magistrate, the accused became vested with the right to cross-examine. In the present case, therefore, since the Magistrate gave the accused permission to cross-examine Mr. Thorpe and the accused did exercise that right, he must be deemed to have had both the right and the opportunity to cross-examine the witnesses. In our opinion, therefore, Section 33, Evidence Act was fully applicable to the statement of Mr. Thorpe and it should have been brought on the record and placed before the jury.

41. Since the evidence of Mr. Thorpe was excluded from consideration by the jury and since the case involves an investigation into a very serious crime, we' feel that a retrial should be ordered.

42. The result, therefore, is that we quash the trial before the learned Sessions Judge and order that the accused may be retried after proper reframing of the charges.

